OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

2004 – 2005 ANNUAL REPORT

The "overarching purpose of access to information legislation [...] is to facilitate democracy." The legislation does this by insuring that citizens are properly informed so as to be able to participate meaningfully in the democratic process and by insuring that politicians and bureaucrats remain accountable to citizens.

(Dawson J., A.G. Canada v. Information Commissioner of Canada; 2004 FC 431, [22])

The essence of liberty in a democratic society is the right of individuals to autonomy – to be free from state interference. The right to privacy has several components, including the right (with only limited and clearly justified exceptions) to control access to and the use of information about individuals. Although privacy is essential to individual autonomy, it is not just an individual right. A sphere of privacy enables us to fulfill our roles as community members and is ultimately essential to the health of our democracy.

(*Privacy and the USA Patriot Act: Implications for British Columbia Public Sector Outsourcing*; B.C. OIPC, Oct. 2004, p. 13)

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August 5, 2005

Hon. Mr. P. Myron Kowalsky
Speaker of the Legislative Assembly
129 Legislative Building
Regina, Saskatchewan
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Dear Mr. Speaker:

I have the honour to submit my 2004-2005 Annual Report to be laid before the Legislative Assembly in accordance with the provisions of Section 62(1) of *The Freedom of Information and Protection of Privacy Act* and Section 60(1) of *The Health Information Protection Act*.

Respectfully submitted,

R. Gary Dickson, Q.C.
Information and Privacy Commissioner

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I. INTRODUCTION

As we celebrate our first 100 years as a province, it is appropriate to observe that Saskatchewan has a rich history of valuing information about the people of this province and about the business of the public bodies that serve them.

When the late T.C. Douglas assumed office as the 8th Premier of Saskatchewan in 1944 he discovered that almost no government records had been left from the outgoing administration. He committed that such a situation should not be repeated by successive governments in this province. That commitment is evident in the importance attached to our excellent provincial archives.[1] Saskatchewan Health maintains a vast database of historic health information that has been useful in managing our public health care system. We have one of the most active genealogical communities in the nation. Saskatchewan was one of the first Canadian jurisdictions to enact freedom of information and privacy legislation.[2] This province is one of only four provinces that have enacted a health information privacy law.[3] This is one of only four Canadian jurisdictions that have created a statutory right of citizens to sue for an unreasonable invasion of privacy.[4] More recently, the Saskatchewan government became the first government in Canada to announce that it would commit to meeting the highest standards in the private or public sector for the protection of privacy.[5]

The challenge for Saskatchewan in its 101st year is to build on that historic commitment to open government and strong privacy protection. This Annual Report provides an opportunity to assess just how well Saskatchewan has done in 2004-2005 in honouring that rich legacy.

This Annual Report covers the first full fiscal year of the Office of the Information and Privacy Commissioner (OIPC) with a full time commissioner.

The office is grateful to the Legislative Assembly Office that provides us with legal, administrative, financial, library resources, and information technology support.

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[1] Presentation by National Archivist, 2005 Annual Summit of Information and Privacy Commissioners, Ottawa, June 9, 2005; See also, *Arthur Silver Morton and his Role in the Founding of the Saskatchewan Archives Board*, Archivaria 32 (Summer 1991) at p. 109.

[2] S.S. 1990-91, c. F-22.01 as am.

[3] S.S. 1999, c. H-0.021, as am.

[4] R.S.S. 1978, c. P-24

[5] *An Overarching Personal Information Privacy Framework for Executive Government.* Available online at www.privacy.sk.ca

II. MANDATE OF THE COMMISSIONER

There are four major elements in the Commissioner's mandate defined by *The Freedom of Information and Protection of Privacy Act* (the FOIP Act), *The Local Authority Freedom of Information and Protection of Privacy Act* (the LA FOIP Act) and *The Health Information Protection Act* (HIPA)[6]:

1. The Commissioner responds to requests for review of those decisions made by government institutions, local authorities or health information trustees in response to access requests and makes recommendations to those bodies.

2. The Commissioner responds to complaints from individuals who believe their privacy has not been respected by government institutions, local authorities, or health information trustees and makes recommendations to those bodies.

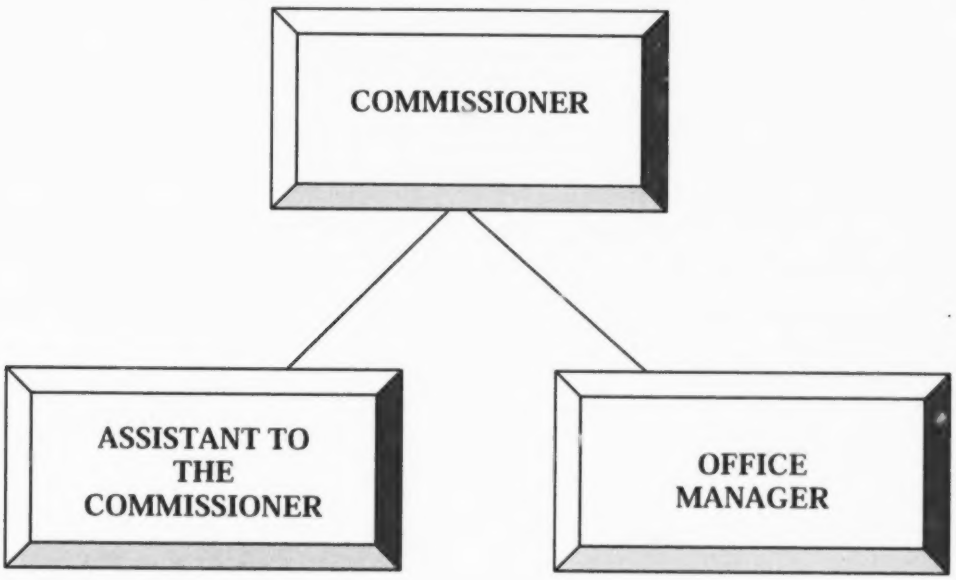
3. The Commissioner provides advice to government institutions, local authorities or health information trustees on legislation, policies, or practices that may impact access or privacy rights.

4. The Commissioner undertakes public education with respect to information rights including both access to information and protection of privacy.

The vision of our office is that the people of Saskatchewan shall enjoy the full measure of the information rights that have been affirmed by the Legislative Assembly of Saskatchewan.

[6] S.S. 1990-91, c. F-22.01; S.S. 1990-91, c. L-27.1; SS, 1999, c. H-0.021. Available online at www.oipc.sk.ca under the "Legislation" tab.

III. ORGANIZATIONAL STRUCTURE



IV. COMMISSIONER'S MESSAGE

In reflecting on the first full fiscal year of our office with a full-time Commissioner, I decided that it is timely to use my 2004-2005 Annual Report to provide an overall assessment of both the freedom of information and protection of privacy environment in Saskatchewan.

Although there has been significant progress over the last fiscal year a number of key issues require attention. The portion of this report ***Privacy and Access: A Saskatchewan 'Roadmap' for Action*** considers the need to:

- Renew the government culture of openness;
- Conduct a review of the FOIP and LA FOIP Acts;
- Integrate the FOIP and LA FOIP Acts into a single law;
- Extend privacy protection to employees in the private sector;
- Address the issue of privacy and public registries; and
- Build capacity in administering the FOIP Act, the LA FOIP Act, and HIPA.

I am convinced that these issues are vital to addressing the growing demand in Saskatchewan for transparency and accountability in public services and the protection of privacy. Not all of these reforms can reasonably be implemented immediately. It is important however that the government commit to move on these issues that are of concern to the citizens of Saskatchewan.

IV. COMMISSIONER'S MESSAGE (CONT'D)

A. IMPORTANT FIRST STEPS

- Saskatchewan Justice has announced that it will create an access and privacy unit responsible for administration of the FOIP Act. There is a compelling need for this kind of operational leadership and support within government. My office looks forward to working with the new Executive Director and staff to ensure full compliance with the Act.

- A number of provincial government departments have started to integrate both access and privacy responsibilities in a senior FOIP coordinator. Saskatchewan Health, Government Relations & Aboriginal Affairs, Information Technology Office, Justice, Learning, and Northern Affairs have already appointed FOIP Coordinators responsible for both access and privacy. This recognizes that access and privacy are the dual themes in the legislation and have much in common. This also represents an important efficiency and coordination in the public service.

- A number of departments, Crowns, local authorities, and health trustees have started to consult with our office on proposed programs and initiatives. Increasingly, these public bodies are sharing with us completed Privacy Impact Assessments (PIAs) and inviting our comments. This allows us to provide early advice and suggestions at the point where changes can be made to strengthen access and privacy provisions.

- Progress is being made in the development of regulations under HIPA. Appropriately, the draft regulations were published to invite comments and public feedback. We published our analysis of these draft regulations on our website, www.oipc.sk.ca in the hope this would stimulate and inform public discussion of HIPA regulations. One regulation[7] has already gone into force and consideration continues on the balance of draft regulations.

- Many departments, local authorities, and health trustees have invited our office to make presentations on the applicable legal requirements to their staff. We then work with these organizations to undertake their own internal training materials and programs. In such a large province this approach of 'training the trainers' is particularly important.

- The government, with the adoption of the *An Overarching Personal Information Privacy Framework for Executive Government* (Overarching Privacy Framework)[8], has committed to improving the protection of privacy for Saskatchewan residents. In this last year we have discovered a very high level of awareness of the general themes of this government initiative among public bodies including many local authorities.

[7] *The Health Information Protection Regulations*, c. H-0.021 Reg 1
[8] Available online at www.privacy.gov.sk.ca

IV. COMMISSIONER'S MESSAGE (CONT'D)

A. IMPORTANT FIRST STEPS (CONT'D)

- Important work is being done by the Information Technology Office and Justice in reviewing contracting out procedures and forms to address security of personal information in the possession or under the control of provincial departments.

- Saskatchewan Crown corporations have been working diligently on the development of comprehensive privacy and access policies to improve compliance and then training staff. We have been consulted by a number of the Crowns and offered input and advice on their training materials and policies.

- Saskatchewan Justice has updated its list of "government institutions" by means of its July 2004 amendment to F-22.01 REG 1, Appendix, Part I. This had been a recommendation in our Annual Report 2003-2004 (page 9).

- I understand that a number of local authorities, departments and Crowns are actively considering enrolling key staff in the Information Access and Protection of Privacy (IAPP) Certificate Program offered by the University of Alberta. This post-secondary online program is the first of its kind in Canada and provides specific training and certification to qualified access and privacy professionals.

It would be timely for the Premier to advance this principle of openness by issuing an open letter to all ministers and deputy ministers underscoring the government's direction that a culture of openness and transparency within government must underlie decision-making under our access laws. The letter should stress the importance and value of Saskatchewan's freedom of information and protection of privacy laws in a thriving democratic society. It should also set clear expectations that information will be disclosed as the normal course of business and that only in limited circumstances, where there are clear and compelling reasons, will the FOIP and the LA FOIP Acts be used to deny access.

It is important that government take these actions not only to reinforce the true intentions of our laws, but also to instill in the public a greater confidence in the integrity of our government.

B. PERSONAL THANKS

Working in one of Canada's smallest access/privacy oversight offices and overseeing three different laws requires remarkably talented and committed staff. I wish to acknowledge the substantial contributions made by our Office Manager, Ms. Pamela Scott, and by my Assistant, Ms. Diane Aldridge. In addition, we received valuable part-time help from Ms. Sandra Merk. It is by virtue of their creativity and resourcefulness that this office has been able to undertake projects on a scale that would otherwise have been impossible.

V. ACCOMPLISHMENTS AND INITIATIVES

A. OIPC WEBSITE

Our website, www.oipc.sk.ca, has proven to be a useful vehicle for sharing information about our office and Saskatchewan legislative access and privacy requirements. The site attracts approximately 2,000 visitors each month. It includes archived copies of all reports issued by our office under the FOIP Act, the LA FOIP Act and HIPA as well as other resources designed to assist both members of the public and public bodies. It also has hyperlinks to 33 other access/privacy websites including relevant Saskatchewan bodies, other provincial oversight offices, national information and privacy commissioners and international access and privacy bodies. The site also features our three-year business plan, our Annual Reports and ad hoc reports such as our response to draft HIPA regulations and our analysis of the Overarching Privacy Framework.

B. THE SASKATCHEWAN FOIP FOLIO

In this fiscal year we published 10 more issues of our E-newsletter, the Saskatchewan FOIP FOLIO. We have now approximately 1,300 subscribers to this publication. Also, we are advised by a number of subscribers that they routinely distribute the FOIP FOLIO to co-workers in their respective organizations.

Each month the FOIP FOLIO includes a wide variety of topics aimed at different segments of Saskatchewan's population, professional and public. Some past headlines include: *E-Government through a Saskatchewan filter; Radio Frequency Identification Tags; Protecting Privacy 'on the road'; What Personal Information Can a College Disclose to Media?; It is No Good Having a Statutory Remedy If Your Staff Don't Know About It!; Public Registries and Privacy; Identity of Applicant is Personal Information; Disclosure of Personal Information to Unions; Frivolous and Vexatious Requests; Saskatchewan's Health Quality Council Leads Again; Identity Theft is a Problem in Saskatchewan too!!;* and, *Is Your Photocopier/Fax Machine Leaking Confidential Stuff?*

All copies of the FOIP FOLIO are archived on our website: www.oipc.sk.ca. To become a subscriber, our office requires only an e-mail address.

C. PUBLIC AWARENESS

Conducting education programs and providing information concerning the provincial access and privacy laws is a major part of the mandate of the OIPC.

In this fiscal year, our office has provided approximately 145 education presentations in more than 16 communities throughout Saskatchewan. Appendix B is a sample list of organizations that have received such a presentation. Feedback surveys rate the information provided in such sessions to be valuable to them in their work.

V. ACCOMPLISHMENTS AND INITIATIVES (CONT'D)

C. PUBLIC AWARENESS (CONT'D)

There continues to be strong demand among government institutions, local authorities and health trustees for accurate information on their responsibilities and opportunities under the applicable provincial legislation.

D. CONSULTATION/ADVICE

Increasingly our office has been consulted by provincial government departments, Crown corporations, and local authorities for advice and direction on specific issues and challenges they experience in applying the appropriate legislation. An important function of the OIPC is to serve as a resource for these Saskatchewan public bodies on access and privacy matters. Some examples of the kinds of consultation include the following:

- Regina Safer Communities Initiative,
- Pharmaceutical Information Program,
- Student loan program,
- Proposed amendments to *The Vital Statistics Act*, and
- Proposed *Mandatory Testing and Disclosure (Bodily Substances) Act*

E. OUR THREE-YEAR BUSINESS PLAN

Our office published a business plan for the years 2005-2006 to 2007-2008 on our website in early 2005. This plan is available at www.oipc.sk.ca under the "What's New" tab. The plan is constructed on the basis of five "core business" areas and describes 10 different goals. This plan outlines 45 performance measures for the next three years against which the performance of our office may be assessed. The plan recognizes fiscal pressures facing the government and the need to operate as efficiently and cost-effectively as possible. At the same time, the plan reflects a marked increase in demand for service from departments, Crown Corporations, boards, commissions, agencies, school divisions, universities, colleges, regional health authorities, municipalities, and health trustees. The plan anticipated that two portfolio officers or investigators and an administrative support person would be hired in 2005-2006. We projected that with the three additional staff we would be in a position to eliminate the backlog in requests for review by the end of 2005-2006 fiscal year.

In this plan we attempted to realistically reflect the minimal resources required for our office to meet its statutory mandate. The Board of Internal Economy has approved a smaller budget than our funding request and, as a consequence, we will have to reduce service and will not be able to address all parts of a very broad statutory mandate. It is now unlikely that we will meet the goal in our business plan to eliminate the backlog of investigations and reviews in this next calendar year.

V. ACCOMPLISHMENTS AND INITIATIVES (CONT'D)

F. PRIVACY LAWS AND HEALTH INFORMATION: MAKING IT WORK

In our last Annual Report we identified the need for a major conference in the province focused on health information. We approached several large organizations with a provincial focus to encourage them to undertake such a project. In June 2004 when it became apparent that no organization would be willing to spearhead such a conference before mid to late 2005, we determined that would be too late given the need of trustees for accurate, practical information on HIPA compliance. We then made the decision that our office would take the lead. We advised Saskatchewan Health, Saskatchewan Association of Health Organizations (SAHO), and all health regions that we intended to organize a conference in the fall of 2004 but needed help to do so. We received support from a number of organizations including Saskatchewan Health, Saskatchewan Learning, Regina Qu'Appelle Regional Health Authority, Saskatoon Regional Health Authority, Heartland Regional Health Authority, SAHO, Saskatchewan College of Pharmacists, Saskatchewan Association of Licensed Practical Nurses, Saskatchewan College of Psychologists, and the University of Saskatchewan. This led to the creation of a steering committee. That committee continued to meet regularly throughout the summer. The conference, Privacy Laws and Health Information: Making it Work, took place in Regina October 27 and 28, 2004. The conference featured more than 40 speakers from five different provinces. We met our registration capacity of 400 a full month before the conference and had a significant wait list that we could unfortunately not accommodate.

Speakers included Ms. Jennifer Stoddart, Privacy Commissioner of Canada; Mr. Frank Work, Q.C., Alberta Information and Privacy Commissioner; Mr. David Loukidelis, British Columbia Information and Privacy Commissioner; and, Mr. Barry Tuckett, Manitoba Ombudsman. Feedback from participants was very positive. Many advised that information they gleaned from the two-day conference would significantly assist their own HIPA compliance efforts. Copies of all presentations are available on our website: www.oipc.sk.ca. Thanks to the assistance of SAHO, all of the plenary sessions and a number of the workshop sessions were videotaped and a two-disk DVD set of those recorded sessions is now available from SAHO for a modest $20 per set.

G. PRIVACY IMPACT ASSESSMENT

We published on our website a Privacy Impact Assessment (PIA) designed to be used by an organization with any of the three laws that our office oversees. A PIA is a diagnostic tool to help organizations assess their compliance with the privacy requirements of Saskatchewan legislation. We received feedback from some organizations that its scope made the document awkward to use. We received requests for a separate PIA focused on health information and HIPA. To that end we arranged with Mr. Jason Hall, a University of Regina graduate student, to create one PIA for HIPA and a separate PIA for the FOIP

V. ACCOMPLISHMENTS AND INITIATIVES (CONT'D)

G. PRIVACY IMPACT ASSESSMENT (CONT'D)

Act and the LA FOIP Act. Our plan is to review the new HIPA PIA with regional health authorities and then incorporate feedback into the PIA before publishing it on our website. We anticipate this will occur in the summer of 2005. We are very grateful to Mr. Hall for his work on this project.

VI. PRIVACY AND ACCESS: A SASKATCHEWAN 'ROADMAP' FOR ACTION

A. CULTURE OF OPENNESS

Neither the FOIP Act nor the LA FOIP Act includes a statement as to the object or purpose of these laws. The Saskatchewan Court of Appeal has however declared that the basic purpose of FOIP *"reflects a general philosophy of full disclosure unless information is exempted under clearly delineated statutory language. There are specific exemptions from disclosure set forth in the Act, but these limited exceptions do not obscure the* ***basic policy that disclosure, not secrecy is the dominant objective of the Act****".*

To realize such an objective Saskatchewan must develop a culture of openness within government that reflects the underlying principles of our laws.

The government has recently focused on the other twin theme in the FOIP Act and the LA FOIP Act, namely the protection of privacy. It has published a clear commitment to strengthen privacy protection in the form of the Overarching Privacy Framework. The two statutes however represent an elegant balance of two different but equally important messages: **(1) public information is accessible; and, (2) personal information is protected**. Conspicuously missing from Saskatchewan's new privacy initiative has been attention to the transparency theme in the FOIP Act and the LA FOIP Act.

In her 2003 Annual Report, Ontario Information and Privacy Commissioner Ann Cavoukian observed as follows:

> *"When he was first elected in 1993, U.S. president Bill Clinton sent a memorandum to all heads of federal departments and agencies that characterized the U.S. Freedom of Information Act as 'a vital part of the participatory system of government,' and he made it clear to the leaders of his administration that 'the existence of unnecessary bureaucratic hurdles has no place in its implementation.' At the same time, his attorney general, Janet Reno, directed senior legal officers throughout the government to apply a presumption of disclosure when making access decisions. She made it clear that 'where an item of information might technically or arguably fall within an exemption, it ought not to be withheld unless it need be.'"*

In a number of other Canadian jurisdictions, governments have signaled the importance they attach to freedom of information including such jurisdictions as Ontario, British Columbia and Alberta. In our centennial year, there is a compelling need for the Saskatchewan government to signal what importance it attaches to open and transparent government.

VI. PRIVACY AND ACCESS: A SASKATCHEWAN 'ROADMAP' FOR ACTION (CONT'D)

A. CULTURE OF OPENNESS (CONT'D)

A powerful and unambiguous signal would be the publication of an open letter to all ministers and deputy ministers that is similar in style and substance to the messages from President Clinton and Ms. Reno. In particular, this should stress the key role of the FOIP and LA FOIP Acts in ensuring openness and transparency. This should also set expectations that public information will be disclosed in the absence of clear and compelling reasons not to do so.

B. UPDATING OUR LAW

i. UNFINISHED BUSINESS

In our last Annual Report we endorsed the outstanding recommendations from former Commissioner Rendek for review and amendment of the FOIP Act. Our 2003-2004 Annual Report included a recommendation that an all-party committee of the Legislative Assembly should review the FOIP and LA FOIP Acts to determine how these laws might be revised to better achieve the purposes of the legislation. I recommended this be done by means of a public consultation. This recommendation has not been acted upon by the Saskatchewan government.

In my last Report, I identified 23 matters that warranted attention and amendment. That list, now revised includes:

1. Consolidate both the FOIP and LA FOIP Acts into a single instrument.

2. Expand exemption for solicitor-client privilege to include all kinds of legal privilege recognized at common law, including public interest privilege or case by case privilege.

3. Include police services and police commissions as local authorities as is the case with every other jurisdiction other than Prince Edward Island.

4. Include a duty to protect personal information. (This is discussed under, **A Gaping Hole in FOIP**, page 15).

5. Create the power for the Commissioner to authorize a public body to disregard requests for access.

6. Clarify that independent officers of the Legislative Assembly are not government institutions.

VI. PRIVACY AND ACCESS: A SASKATCHEWAN 'ROADMAP' FOR ACTION (CONT'D)

B. UPDATING OUR LAW (CONT'D)

i. UNFINISHED BUSINESS (CONT'D)

7. Give the Commissioner the opportunity to delegate powers.

8. Make it an offence to destroy or tamper with documents for the purpose of evading an access request.

    - Example: A person must not willfully alter, falsify or conceal any record, or direct another person to do so, with the intent to evade a request for access or destroy any records subject to the Act or direct another person to do so with the intent to evade a request for access to the records.

9. Permit disclosure of personal information for 'shared services' such as School[PLUS] subject to appropriate safeguards.

10. Create an express duty to assist applicants.

    - Example: Head must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

11. Include a Purpose Clause in the statute.

12. Strengthen and revise the paramountcy provision so it applies to the entire Acts.

13. Include the right to make a continuing request for access.

14. Include a public interest override provision that imposes a positive duty on a head to disclose in case of significant risk to public health or safety or where there is a compelling public interest.

15. Narrow the exception in section 30(2) in the LA FOIP Act and section 31(2) in the FOIP Act, for an individual seeking his or her own personal information.

16. Expressly give the Commissioner the power to review fees and fee estimates.

17. Make the Information and Privacy Commissioner office an administrative tribunal instead of an ombudsman.

VI. PRIVACY AND ACCESS: A SASKATCHEWAN 'ROADMAP' FOR ACTION (CONT'D)

B. UPDATING OUR LAW (CONT'D)

i. UNFINISHED BUSINESS (CONT'D)

18. Allow the public body to give the opportunity to an applicant to examine the record even if it is reasonable to produce a copy.

19. Require the public body to create a record for an applicant if the record can be created from a record that is in electronic form and in the custody or under the control of a public body, using its normal computer hardware and software and technical expertise, and creating the record would not unreasonably interfere with the operations of the public body.

20. Define "lawful investigation".

21. Consider qualifying the right to refuse access in the event of perceived danger to physical or mental health of an individual by requiring advice from a psychiatrist, psychologist or other appropriate expert.

22. Develop a "business card" exception to the definition of personal information insofar as government employees are concerned.

23. Require that notice of a correction of personal information be provided to any third party that had been supplied with the erroneous information within the past 12 months.

24. Permit fees to be waived in whole or in part if a fee waiver would be in the public interest, regardless of the financial status of the applicant.

25. Clarify the burden of proof in the event of an application for a fee waiver.

In the intervening year, the need for legislative change has become more urgent and more compelling. I offer the following examples:

(1) We have no power to investigate requests for review and breach of privacy complaints against police services or police commissions. Given recent high-profile issues with Saskatchewan police services, one might expect that it would be important to ensure that this important accountability instrument (LA FOIP) would apply to those services. The RCMP are subject to both the federal *Access to Information Act* and *Privacy Act*. In the result, citizens have different access and privacy rights, depending on whether their local police service is the RCMP or a local force.

VI. PRIVACY AND ACCESS: A SASKATCHEWAN 'ROADMAP' FOR ACTION (CONT'D)

B. UPDATING OUR LAW (CONT'D)

i. UNFINISHED BUSINESS (CONT'D)

(2) In early 2005, a single applicant submitted in excess of 100 requests for access under the FOIP Act to Saskatchewan Labour. We determined that, in the circumstances of these requests, this was an abuse of the FOIP process. There is however no power in the FOIP Act that allows our office to waive the requirement that a public body must respond to each and every access request in this kind of situation.

ii. A GAPING HOLE IN FOIP

Our 'first-generation' FOIP and LA FOIP Acts do not include any duty for a public body to safeguard the personal information in its possession or under its control. The effect is that Saskatchewan citizens continue to experience an unreasonably high level of risk that their personal information entrusted to public bodies will be used or disclosed inappropriately. The risk escalates as government captures more personal information on citizens and employees and shares that information with more organizations inside and outside of executive government.

Such a duty is one of the 10 'Fair Information Practices' that is the basis for all public sector and private sector privacy laws in Canada. These Fair Information Practices have been codified in the Canadian Standards Association Privacy Principles. The relevant principle is stated as follows:

Principle 7 – Safeguards

Personal information shall be protected by security safeguards appropriate to the sensitivity of the information.

7.1
The security safeguards shall protect personal information against loss or theft, as well as unauthorized access, disclosure, copying, use, or modification. Organizations shall protect personal information regardless of the format in which it is held.

VI. PRIVACY AND ACCESS: A SASKATCHEWAN 'ROADMAP' FOR ACTION (CONT'D)

B. UPDATING OUR LAW (CONT'D)

ii. A GAPING HOLE IN FOIP (CONT'D)

7.2
The nature of the safeguards will vary depending on the sensitivity of the information that has been collected, the amount, distribution, and format of the information, and the method of storage. More sensitive information should be safeguarded by a higher level of protection....

7.3
The methods of protection should include

(a) physical measures, for example, locked filed cabinets and restricted access to offices;
(b) organizational measures, for example, security clearances and limiting access on a "need-to-know" basis; and,
(c) technological measures, for example, the use of passwords and encryption.

7.4
Organizations shall make their employees aware of the importance of maintaining the confidentiality of personal information.

7.5
Care shall be used in the disposal or destruction of personal information, to prevent unauthorized parties from gaining access to the information. ...[9]

Such a 'duty to protect' provision is the standard found in more modern legislation in British Columbia, Alberta, Manitoba, Ontario, Quebec, Prince Edward Island and Newfoundland and Labrador. It is included in Saskatchewan's *The Health Information Protection Act*, Alberta's *Health Information Act*, Manitoba's *Personal Health Information Act* and Ontario's *Personal Health Information Protection Act*. We also note that the duty to protect is mentioned in the Saskatchewan government's Overarching Privacy Framework.

[9] Deloitte & Touche, Government of Saskatchewan Privacy Assessment, February 12, 2003, p. 43

VI. PRIVACY AND ACCESS: A SASKATCHEWAN 'ROADMAP' FOR ACTION (CONT'D)

B. UPDATING OUR LAW (CONT'D)

ii. A GAPING HOLE IN FOIP (CONT'D)

We recommend that the Saskatchewan government forthwith amend the FOIP and LA FOIP Acts to incorporate an explicit duty to protect such as the following:

> **The head of a government institution must protect personal information by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or destruction.**

The duty should be reinforced by an explicit offence in the Acts for a public body or a contractor to use or disclose personal information in violation of the Acts, punishable by a fine in the order of $500,000 or a significant term of imprisonment or both. Fines may be rarely meted out but the very existence of such an offence and penalties surely will concentrate the minds of the heads of provincial bodies and local authorities. That would be a salutary result.

Although the Overarching Privacy Framework requires that personal information be protected, this is at best a policy without the clout of legislative proscription. Such policy can be readily changed by executive government and is not enforceable in the fashion of a legislated requirement. Furthermore, our office supports the principle of transparency and 'plain language' legislation. A citizen should be able to locate in the relevant legislation, with relative ease, the key safeguards to protect his or her personal information and should not be required to review two statutes, two sets of regulations, as well as a 51 page policy document.

C. ONE LAW TOO MANY?

There are currently six different access or privacy laws that apply in this province. Two of these are federal (*Privacy Act* and *Personal Information Protection and Electronic Documents Act* (PIPEDA)) and four are provincial laws (*The Privacy Act*, the FOIP Act, the LA FOIP Act, and HIPA). One can readily see why three of the four provincial laws are necessary but there is no good reason to have one access and privacy law for provincial government institutions and almost an identical law for local authorities. This is confusing for citizens and public sector employees alike. There are separate forms and certain minor differences in the two public sector laws that operate to trip up the public and employees. In addition, in many respects the LA FOIP Act has been orphaned. No provincial department has taken meaningful responsibility for administration of the LA FOIP Act although notional responsibility would rest with Saskatchewan Justice. There is no requirement for an annual report that reviews how local authorities are dealing with

VI. PRIVACY AND ACCESS: A SASKATCHEWAN 'ROADMAP' FOR ACTION (CONT'D)

C. ONE LAW TOO MANY? (CONT'D)

requests for access or privacy complaints. I am unaware that anyone is tracking statistics with respect to activities under the LA FOIP Act. Ontario is the only other Canadian province that has created a separate law for local government but there has been a great deal of work done in that province to support local government agencies in their compliance efforts. All of the more recent provincial access and privacy laws have rolled both provincial government bodies and local authorities into a single FOIP Act. I recommend that the scope of the FOIP Act be expanded to capture local authorities and that the LA FOIP Act be repealed.

D. EMPLOYEES DESERVE PRIVACY PROTECTION TOO!

Our office continues to receive a significant number of inquiries from employees in the Saskatchewan private sector about their privacy 'rights'. In fact, those employees do not have anything equivalent to the privacy protection now available for public sector employees. The OIPC must advise those individuals that there is no provincial privacy law that addresses their personal information in the custody or control of their private sector employers and that the federal private sector law, PIPEDA, does not apply to employees unless they work in a federally regulated business such as banking, airlines, telecommunications or interprovincial transportation.

It is important to recognize that for many organizations the most sensitive and prejudicial personal information in their possession relates to employees. This will likely include Social Insurance Numbers, health registration numbers, information about dependents, personal relationships and personal health information. It is ironic that in Saskatchewan customers who provide, in most cases, limited personal information to a business would be fully protected but the employee who has shared much more extensive and much more prejudicial information at their place of employment will be unprotected.

We note that preparations are underway by Industry Canada for the statutorily mandated review of PIPEDA. From the feedback we have received from many diverse types of organizations and individuals in Saskatchewan, it is apparent that PIPEDA is not working satisfactorily for many Saskatchewan small and medium-sized businesses and most employees in the private sector. We encourage the government of Saskatchewan to act on our recommendation in our last Annual Report and consider the adoption of private sector privacy legislation similar to the *Personal Information Protection Acts* in British Columbia and Alberta. Alternatively, the Saskatchewan government should consider actively participating in the formal Industry Canada consultation and advance recommendations for amendment of PIPEDA to better address the needs of small and medium-sized businesses

VI. PRIVACY AND ACCESS: A SASKATCHEWAN 'ROADMAP' FOR ACTION (CONT'D)

D. EMPLOYEES DESERVE PRIVACY PROTECTION TOO! (CONT'D)

in this province. I would further recommend that the Saskatchewan government undertake a public consultation on the question of private sector privacy similar to what has taken place in Manitoba, Ontario, British Columbia, and Alberta. Such a consultation might:

- Raise awareness of the challenges posed by too many different privacy laws that do not work particularly well together;
- Consider how we can ensure that Saskatchewan employees enjoy protection of their personal information at least equal to that now available to public sector employees;
- Consider the extent to which Saskatchewan businesses may be at a competitive disadvantage relative to competitors in British Columbia and Alberta; and,
- Provide an opportunity to simplify and harmonize the different access and privacy laws in this province.

E. PUBLIC REGISTRIES IN A NEW PRIVACY-AWARE WORLD

Saskatchewan has a number of what might be described as "public registries". These are publicly accessible sources of information on such things as land titles, municipal tax rolls, motor vehicles, the Personal Property Security Registration system, election finance records, birth and death information. These registries have, in most cases, existed for many decades and are often important sources of commercial information. These registries have typically operated outside of the scope of the FOIP Act on the basis that this is "*published material or material that is available for purchase by the public,*"[10] or that it is "*material that is a matter of public record*".[11]

When public registers were kept mostly on paper in fixed locations in registry offices, the practical barriers to accessing bulk information provided a measure of privacy. Modern technology is now profoundly affecting the administration of those public registries and in the process seriously undermining privacy and facilitating identity theft. That same personal information in public registries can now be collected in bulk, sorted and matched with other personal information to readily construct data profiles of citizens.

[10] The FOIP Act, s. 3a; the LA FOIP Act, s. 3a.
[11] The FOIP Act, s. 3b; the LA FOIP Act, s. 3b.

VI. PRIVACY AND ACCESS: A SASKATCHEWAN 'ROADMAP' FOR ACTION (CONT'D)

E. PUBLIC REGISTRIES IN A NEW PRIVACY-AWARE WORLD (CONT'D)

The European Commission Working Party on the Protection of Individuals with Regard to the Processing of Personal Data has stated:

> *"The computerization of data and the possibility of carrying out full-text searches creates an unlimited number of ways of querying and sorting information, with Internet dissemination increasing the risk of collection for improper purposes. Furthermore, computerization has made it much easier to combine publicly available data from different sources, so that a profile of the situation or behaviour of individuals can be obtained...[P]articular attention should be paid to the fact that making personal data available to the public serves to fuel the new technologies of data warehousing and data mining. Using these technologies, data can be collected without any advance specification of the purpose and it is only at the stage of actual usage that the various purposes are defined.*
>
> *"This is why it is important to check, on a case-by-case basis, what the negative repercussions on individuals might be, before taking any decision on computerized dissemination. In some cases, a decision will have to be taken on either not to release certain personal data, to let the data subject decide, or to impose other conditions."*

In response to this new threat to privacy, the Office of the Victorian Privacy Commissioner in Australia has published a set of guidelines – *Public Registers and Privacy – guidance for the Victorian Public Sector.* This useful tool is accessible at http://www.privacy.vic.gov.au.

These guidelines involve a number of key questions such as:

- What is the purpose of a public registry?
- Should certain personal information be masked?
- Should individuals be asked at the time of registration whether they consent to use or their personal information for other purposes such as direct marketing of goods or services?
- Should bulk registry data be disclosed only for certain purposes or at all?
- Before a public registry is put 'online', have privacy enhancing measures been considered?

I recommend that the provincial government undertake a public consultation of these issues with respect to public registries to consider how privacy can be respected given these new challenges.

VI. PRIVACY AND ACCESS: A SASKATCHEWAN 'ROADMAP' FOR ACTION (CONT'D)

F. MAKING THE LAWS WORK FOR CITIZENS AND GOVERNMENT

i. DELAY

In the world of access to information, it is often said that 'information delayed is information denied'. There are at least two kinds of delays identified by our office in Saskatchewan practice: (1) public bodies take too long to respond and often outside of the 30-day prescribed period or the extended period of 60 days available in limited circumstances, and (2) the delay in our office responding to a request for review under Part VII of the FOIP Act and Part VI of the LA FOIP Act.

Too often access requests are not handled efficiently by public bodies. There have been cases where a public body asserts that even though the access request was physically received by that public body on day one, it did not end up on the desk of the appropriate person until day seven. Often the search for responsive records is too narrow. There is little communication with the applicant. This treatment is inconsistent with the purposes of the legislation and is a practice that likely results from a lack of clear procedures or an inadequate training of staff. Unfortunately, we can find no procedures or policies that have been developed by the Saskatchewan government to make it clear to public bodies what their duties are in assisting applicants. This approach is also inefficient, costly, and cumbersome for busy government or local authority organizations. It is important that there be a reorganization of the way public organizations respond to access requests and breach of privacy complaints.

Handling of access requests is made more inefficient by a practice among some public bodies. In those cases, a junior staff person is designated as the FOIP Coordinator but this person has limited or no training, almost no ability to make a decision on release of a document or application of exemptions, and no mandate to negotiate or clarify a request with an applicant. Too often the FOIP Coordinator is required to seek direction from any one of many possible senior persons in that organization to determine release of the record under the Act. In our experience these numerous senior staff have little or no training in the Acts, no practical experience in handling an access request, and consequently there is no consistent approach and response to applicants.

Saskatchewan needs to 'raise the bar' in dealing with access requests.

VI. PRIVACY AND ACCESS: A SASKATCHEWAN 'ROADMAP' FOR ACTION (CONT'D)

F. MAKING THE LAWS WORK FOR CITIZENS AND GOVERNMENT (CONT'D)

i. DELAY (CONT'D)

To counter these delays and problems, I make the following recommendations:

1) Ensure that each public body has one senior person designated by the head as the FOIP Coordinator. This is discussed more fully under, **(ii) Local Leadership Needed**, page 22).

2) The Access to Information Request Form should be available online through the Department of Justice website.

3) An Access to Information Request Form should be revised to include a date that the Applicant completes the document.

4) The public body should ensure that the Access to Information Request Form is provided to a properly trained and qualified FOIP Coordinator the day of receipt by anyone in that organization.

5) The Act should be amended to include an explicit duty to assist an applicant by taking reasonable steps and to include an offence where a public body destroys, tampers or interferes with records to frustrate or deny access under the Acts.

I am hopeful that the new Access and Privacy Division within the Department of Justice will do many things to improve compliance but I submit the foregoing to assist the unit in its compliance efforts.

The second type of delay concerns our office. We have too many reviews that take a year or longer to complete. Our current backlog is approximately 70 cases. The logjam is due to the following factors:

- Our office's workload has increased dramatically since the last year with a part-time Information and Privacy Commissioner. We have outside of Prince Edward Island, the smallest Information and Privacy Commissioner office in the nation. We have only three persons in our office including the Commissioner, the Assistant to the Commissioner and the Office Manager. Only the Commissioner and the Assistant to the Commissioner do the work on files including mediation and report writing.

VI. PRIVACY AND ACCESS: A SASKATCHEWAN 'ROADMAP' FOR ACTION (CONT'D)

F. MAKING THE LAWS WORK FOR CITIZENS AND GOVERNMENT (CONT'D)

i. DELAY (CONT'D)

- The new HIPA has added considerably to our workload and again it is only the Commissioner and the Assistant to the Commissioner who provide summary advice (now very commonly sought by trustees) and undertake investigations under HIPA. We have spent many hundreds of hours on the investigation of the Prevention Program for Cervical Cancer. That report will be published in April 2005.

We have determined that for the fiscal year 2005-2006 our priority will be to reduce the backlog of cases.

ii. LOCAL LEADERSHIP NEEDED

We have discussed in another part of this Annual Report the need for a dedicated unit within the Saskatchewan government responsible for administration of the FOIP and LA FOIP Acts and regulations. That kind of leadership is, in my view, essential to ensure a satisfactory level of statutory compliance that so far eludes this province.

In addition, there is a need for leadership in access to information and privacy matters within each body subject to the FOIP and LA FOIP Acts. Our recommendation is that the Minister or CEO of each government institution and local authority should explicitly designate a senior person as a FOIP Coordinator. This person ideally would either report directly to the CEO or Deputy Minister of the public sector organization or at least would be in a close reporting relationship with the most senior persons in the organization. We have discussed the model job description for a FOIP Coordinator in the January 2004 FOIP FOLIO available at our website: www.oipc.sk.ca under "newsletters" (page 3). This would include ensuring appropriate forms and procedures, training staff, processing privacy complaints and access requests and providing advice on statutory compliance with new programs and initiatives. This person would also liaise with the proposed access and privacy unit within Saskatchewan Justice and with our office.

A number of organizations continue an unusual and inefficient practice of completely dividing access to information and privacy responsibilities between two or more individuals. This makes little sense since access and privacy are both equally important objectives of the FOIP and LA FOIP Acts and there is considerable overlap between both of these two activities. To the extent that this fragmentation continues, Saskatchewan government efforts to achieve full compliance with statutory requirements will be significantly handicapped.

VI. PRIVACY AND ACCESS: A SASKATCHEWAN 'ROADMAP' FOR ACTION (CONT'D)

F. MAKING THE LAWS WORK FOR CITIZENS AND GOVERNMENT (CONT'D)

iii. TRAINING

Many of the problems this office has identified with the administration of the FOIP and LA FOIP Acts can be attributed to weaknesses in organization and inadequate training. The "weaknesses in organization" are discussed in another part of the Annual Report dealing with the role of the FOIP Coordinator.

We recognize that under the auspices of the Public Service Commission, there has been training of government managers in respect of the Overarching Privacy Framework. We understand that different departments are responsible for implementing training of all staff within their organization.

We have observed a tendency of such training sessions to focus almost exclusively on privacy and to largely ignore the access to information provisions. This unbalanced training presentation is unhelpful in achieving full statutory compliance. As noted earlier, the FOIP Act represents a balance of two equally important objectives: (1) public information must be accessible and (2) personal information must be protected. In our experience, training that focuses exclusively on privacy tends to impair the kind of transparency and openness that is essential to any democracy.

There continues to be a dearth of printed materials that explain and interpret the legislation. It makes little sense for each government institution to be left to its own resources to develop a training program without government-wide coordination and support. There is a real need for basic training materials to be assembled. This needs to include more practical information and case studies. Most of the training we have seen is too high level to properly equip employees to comply with the legislation.

Our recommendation is that the new access and privacy unit to be created within Saskatchewan Justice should develop government-wide training modules that will include (a) general introduction to the FOIP Act and (b) the FOIP Act for senior managers. It would be valuable to ensure that there is specialized training for FOIP Coordinators within each government institution.

In this report we have also identified a problem in that the LA FOIP Act has to a large extent been "orphaned" with no department taking meaningful responsibility and accountability for administering this statute. Our office has received many requests from rural municipalities and other local authorities requesting the most basic kinds of information about the LA FOIP Act and their responsibilities under that law. Unless and until some other department is clearly and transparently assigned responsibility for

VI. PRIVACY AND ACCESS: A SASKATCHEWAN 'ROADMAP' FOR ACTION (CONT'D)

F. MAKING THE LAWS WORK FOR CITIZENS AND GOVERNMENT (CONT'D)

iii. TRAINING (CONT'D)

administering the LA FOIP Act, Saskatchewan Justice should ensure that appropriate materials are developed and appropriate training is undertaken.

Many in the public sector, either in provincial government institutions or local authorities have inquired about a conference in the province that could focus on the FOIP and LA FOIP Acts similar to the health information conference (Privacy Laws and Health Information - Making it Work) held in October 2004. Currently a handful of Saskatchewan organizations send employees to major access and privacy conferences in other Canadian provinces. Too few get this opportunity to significantly impact the overall compliance level in Saskatchewan. Also, the focus naturally is on the specific legislation in those other jurisdictions and not on the features unique to Saskatchewan access and privacy legislation. We recommend that the Saskatchewan government plan to host such a conference in the 2005-2006 fiscal year. Our office is available to assist to the extent that our resources permit.

iv. FEES

Fees are an important consideration in charting the health of the access and privacy regime in Saskatchewan. Fees are frequently cited in other Canadian jurisdictions as a major obstacle to access to information.

In the British Columbia Information and Privacy Commissioner's Order 55-1995, the Commissioner stated:

> *"The point of the legislation* [British Columbia's *Freedom of Information and Protection of Privacy Act*] *is to ensure that government information is widely available, so as to improve public accountability of our institutions. To that end obstacles, including* ***fees, should be minimized and, in the case of an issue of public interest ... waived*** [emphasis added]."

I agree with that proposition and find that it applies also in this province.

The fees prescribed by the FOIP Act and Regulations are not out of line with other provinces generally. There are two kinds of fees: (1) an application fee of $20 if the access request is made under the LA FOIP Act and (2) a fee for searching for a record and preparing it for disclosure calculated at the rate of $15 per half hour in excess of two hours.

VI. PRIVACY AND ACCESS: A SASKATCHEWAN 'ROADMAP' FOR ACTION (CONT'D)

F. MAKING THE LAWS WORK FOR CITIZENS AND GOVERNMENT (CONT'D)

iv. FEES (CONT'D)

I have been impressed with the practice of a number of government institutions that will often provide access to records without requiring any fee to be paid by the applicant. I am not clear why there is a $20 application fee if the request is to a local authority under the LA FOIP Act when there is no application fee for a request made under the FOIP Act.

Fee estimates are required when fees appear to exceed $50. There is no provision however for the length of time that is permitted for the one-half of the fee estimate to be paid. Such a provision could allow a government institution or local authority an opportunity to treat the request as "abandoned" if a reasonable time elapses after a fee estimate is furnished to the applicant and no arrangements are made within, for example, 60 days, for payment.

The fee waiver provision is cast in the legislation (both the FOIP Act and the LA FOIP Act and the respective regulations under each statute) very narrowly. Fees can easily be a deterrent to someone exercising the right of access. That is why it is important that there can be a waiver of fees, in full or in part, when that would be in "the public interest". A number of groups routinely function, in part, as monitors of government decisions and activities. This may be a member of the media, an elected legislator, an environmental "watchdog" organization or an interested citizen. Currently, fees can only be waived in the case of a request for general information if there is an impecunious applicant or requester. Section 9(b) of the regulation provides as follows:

> 9 *For the purposes of subsection 9(5) of the Act, the following circumstances are prescribed as circumstances in which a head may waive payment of fees:*
>
> ...
>
> *(b) where payment of the prescribed fees will cause a substantial financial hardship for the applicant and:*
>
> *(i) in the opinion of the head, giving access to the record is in the public interest; or...* [emphasis added]

VI. PRIVACY AND ACCESS: A SASKATCHEWAN 'ROADMAP' FOR ACTION (CONT'D)

F. MAKING THE LAWS WORK FOR CITIZENS AND GOVERNMENT (CONT'D)

iv. FEES (CONT'D)

The experience in other jurisdictions such as British Columbia, Alberta and Ontario is that there are circumstances where the public clearly benefits when certain records are released into the public domain.

I recommend that the Saskatchewan fee regulation be amended to provide that fees can be waived in circumstances where the applicant cannot afford the payment or the record relates to a matter of public interest, including the environment or public health or safety.

VII. *USA PATRIOT ACT* AND OUTSOURCING

The FOIP and the LA FOIP Acts both apply to records in the possession or *"under the control of a government institution"*. The consequence is that when personal information is shared with a contractor for a variety of purposes, it will typically continue to be under the control of a department even if it may be in the possession of a private corporation. That personal information continues to be subject to the provisions of the FOIP or LA FOIP Acts.

In November 2004, British Columbia's Information and Privacy Commissioner produced a seminal report on the consequences of the *USA Patriot Act* for public sector organizations in the province of British Columbia. This question arose in that province when it was proposed that the provincial health department might contract out certain health information management work. Questions were raised about the risk that personal health information of British Columbia residents might be vulnerable to disclosure to the FBI and US authorities under anti-terrorism legislation in the United States of America.

Our office was contacted by a number of individuals and organizations that questioned the potential risk to personal information of Saskatchewan residents posed by the *USA Patriot Act*. In response, we have engaged in discussions with our British Columbia counterpart, Mr. David Loukidelis and have carefully reviewed that Commissioner's report. This report is available at www.oipc.bc.ca.

Commissioner Loukidelis has made a number of recommendations for the government of British Columbia and the government of Canada.

VII. *USA PATRIOT ACT* AND OUTSOURCING (CONT'D)

A number of those recommendations should be considered by the Legislative Assembly in this province. These include the following:

- Amend the FOIP and the LA FOIP Acts to:
    - Impose direct responsibility on a contractor to a public body to ensure that personal information provided to the contractor by the public body, or collected or generated by the contractor on behalf of the public body, is used and disclosed only in accordance with the FOIP and the LA FOIP Acts.
    - Require a contractor to a public body to notify the public body of any subpoena, warrant, order, demand, or request made by a foreign court of other foreign authority for the disclosure of personal information to which the FOIP or the LA FOIP Acts apply.
    - Require a contractor to a public body to notify the public body of any unauthorized disclosure of personal information under the FOIP or the LA FOIP Acts.
    - Ensure that the Information and Privacy Commissioner has the powers necessary to fully and effectively investigate contractors' compliance with the FOIP and the LA FOIP Acts and to require compliance with the FOIP and the LA FOIP Acts by contractors to public bodies, including powers to enter contractor premises, obtain and copy records, and order compliance.
    - Make it an offence under the FOIP and the LA FOIP Acts for a public body or a contractor to a public body to use or disclose personal information in contravention of the FOIP and the LA FOIP Acts, punishable by a fine of up to $1 million or a significant term of imprisonment, or both.
- All public bodies should ensure that they commit, for the duration of all relevant contracts, the financial and other resources necessary to actively and diligently monitor contract performance, punish any breaches, and detect and defend against actual or potential disclosure of personal information to a foreign court or other foreign authority.
- Recogizing that it is not enough to rely on contractors to self-report their breaches, a public body that has entered into an outsourcing contract should create and implement a program of regular, thorough compliance audits. Such audits should be performed by a third party auditor, selected by the public body, that has the

VII. *USA PATRIOT ACT* AND OUTSOURCING (CONT'D)

necessary expertise to perform the audit and recommend any necessary changes and mitigation measures. Consideration should be given to providing that the contractor must pay for any audit that uncovers material noncompliance with the contract.

In addition, elsewhere in this Annual Report I have discussed the need for an explicit statutory duty to protect personal information such as the provision that exists in the British Columbia FOIP Act.

We canvassed all Saskatchewan departments by forwarding to each deputy minister a short questionnaire to determine the extent of contracting out of personal information. What we requested was the following information:

1. How many current arrangements or contracts does your Department have which permit personal information or personal health information of Saskatchewan residents to be moved, even temporarily, outside of Canada?

2. How many current arrangements or contracts does your Department have which permit personal information or personal health information of Saskatchewan residents to be moved, even temporarily, to another Canadian jurisdiction?

3. Is this an increase or decrease over 2003-2004?

4. What steps has your Department taken to ensure that such personal information or personal health information is not misused once it is outside of Saskatchewan?

Several departments replied directly to our survey. We then received a letter from the Information Technology Office (ITO) of the Saskatchewan government. That office advised that it had gathered this information earlier and *"it was decided that the best approach was to have my office respond on behalf of all of executive government (CIC crown corporations are not included in this response)."* The ITO response identified 20 different contracting out arrangements involving 11 different departments. Fourteen different contractors are involved. Of these 14 contractors, six are based in the United States and the balance in Canada. Those six contractors account for 11 of the 20 contracting out arrangements.

There have been no changes in security requirements during 2004-2005 for all but four of the contracts. In two of the four we are advised that *"new contract language specifically prohibits data from leaving Canada - without prior approval"*. In another of the four contracts we are advised that the *"contract has comprehensive confidentiality requirements"* and in the fourth contract, we are advised that *"contract states that* [the contractor] *is compliant with federal privacy act"*.

VII. *USA PATRIOT ACT* AND OUTSOURCING (CONT'D)

We have not had an opportunity to look at the contracts in question but I would make the following observations:

- Compliance with a federal privacy law, either the *Privacy Act* (for public sector organizations) or the PIPEDA (for private sector organizations) provides little comfort. Saskatchewan residents are entitled to expect that their personal information entrusted to provincial government institutions is subject to the relevant Saskatchewan law, i.e. the FOIP Act and in particular Part IV that deals with privacy. There are significant differences between these different laws in addition to the fact that the federal government has no mandate to oversee the activities of Saskatchewan government departments. Finally, if personal data is under the control of a Saskatchewan government institution, it is the Saskatchewan privacy law that applies to that data and not a federal privacy law.

- Contractual provisions addressing confidentiality and security are necessary and important but are, in my view, inadequate in the absence of a specific statutory duty on all public bodies to safeguard personal information reinforced by a statutory offence and substantial penalty. I have addressed elsewhere in this Annual Report the need for amending the FOIP and LA FOIP Acts to include such a duty to safeguard personal information.

- I want to acknowledge an excellent initiative of Saskatchewan Justice, Saskatchewan Property Management Corporation (SPMC) and the ITO to develop the Personal Information Contract Checklist. I note however that:

    - The Checklist and sample contractual provisions typically ignore access and correction of personal information issues.

    - There is a lack of clarity and differentiation between "use" and "disclosure". "Use" refers to what happens with personal information when it is utilized in some fashion by a public body, its agents, employees and contractors. A "disclosure" refers to the movement of personal data from the public sector organization to another organization not under the control of the first organization. In other words, a contractor is in no different position for purposes of the FOIP or LA FOIP Acts than an employee working for a public body.

    - There is a need for a brochure or booklet that provides information to contractors. Many smaller businesses, without sophisticated privacy experience and knowledge may be providing contracted services to local authorities such as school divisions or regional health authorities. A Contractor's Guide that could be made widely available to Saskatchewan

VII. *USA PATRIOT ACT* AND OUTSOURCING (CONT'D)

businesses and non-profit organizations providing fee-for-service for public sector organizations could be modeled on similar publications in many other Canadian provinces.

- There is a need, particularly by smaller provincial bodies, local authorities and health trustees, for a personal information protection schedule that can readily be attached to outsourcing contracts. An excellent model is the model *Privacy Protection Schedule* developed by the British Columbia Ministry of Labour and Citizens' Services, Information Policy and Privacy Branch.[12]

I want to acknowledge the proactive approach taken by the Saskatchewan's Health Quality Council (HQC) to the risk posed by outsourcing. When the HQC was developing its patient feedback survey to assist regional health authorities it considered the risk that existed if personal information was sent to a contractor based in the United States. The HQC decided that it would require modification to the arrangement to ensure that personally identifiable information would not leave Canada.

In conclusion, the *USA Patriot Act* has served a useful purpose by focusing attention on the risks associated with contracting out information services. I believe however, that the more significant risk is that a contractor may improperly disclose or fail to protect personal information. This can happen within Saskatchewan or beyond and Saskatchewan has not yet installed an adequate protection regime to mitigate that risk.

VIII. VIDEO SURVEILLANCE

Since we published our *Guidelines for Video Surveillance by Saskatchewan Public Bodies,* we have been contacted by a number of local authorities that either have installed or contemplate installation of video surveillance systems. Many local authorities had not previously recognized that their video surveillance systems must fully comply with the LA FOIP Act. That means anticipating access requests from persons who have been video recorded; taking steps to ensure there is no improper disclosure of the recording; installing proper security; and developing record retention schedules for the recordings.

We have encountered a widespread assumption that video surveillance systems will somehow make public facilities and offices "safer". In the experience of this office, many public bodies ought to be more rigorous in consideration of the 'need' for video surveillance. There are also instructive experiences in other jurisdictions.

[12] Available online at www.mser.gov.bc.ca/privacyaccess/

VIII. VIDEO SURVEILLANCE (CONT'D)

A report for the United Kingdom Home Office that assesses the very extensive use of video surveillance in London and other communities has come to what will be for many a surprising conclusion;

> *"The truth is that* [video surveillance system] *is a powerful tool that society is only just beginning to understand. It looks simple to use, but it is not. It has many components, and they can impact in different ways. It is more than just a technical solution; it requires human intervention to work to maximum efficiency and the problems it helps deal with are complex. There needs to be greater recognition that reducing and preventing crime is not easy and that ill-conceived solutions are unlikely to work no matter what the investment."*[13]

At one point in the report, the authors state:

> *"Assessed on the evidence presented in this report [the video surveillance system] cannot be deemed a success. It has cost a lot of money and it has not produced the anticipated benefits."*

There are estimated to be more than 2 million video surveillance cameras in the United Kingdom.

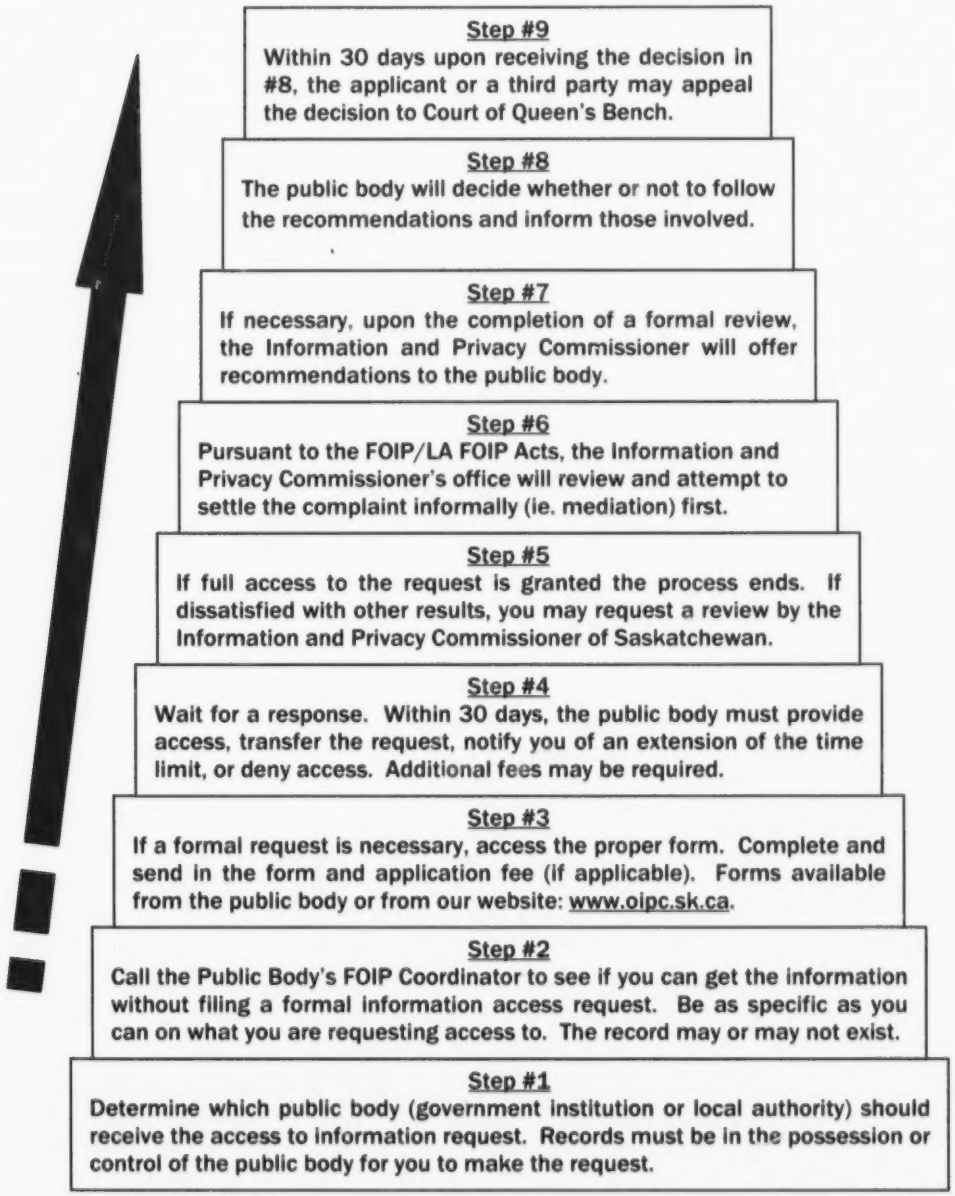
The Edmonton Police Service shortly thereafter completed a review of their video surveillance or Closed Circuit Television (CCTV) project in the Old Strathcona area of that city. The review concluded that the deterrent effect of CCTV could not be disentangled from numerous other factors such as police officer deployment, enforcement and other police initiatives. Published research studies were reviewed and indicated that overall there is no conclusive evidence that CCTV monitoring of city centre streets or public housing leads to a reduction in crime. The authors of the Edmonton review found that CCTV had a limited role in detecting offences. In most cases, the CCTV was used to observe incidents where police were already on the scene. There was no evidence to suggest that CCTV assisted in police investigations.

I will continue to urge public organizations to be cautious before implementing video surveillance. There is good reason to be skeptical that the benefits flowing from video surveillance offset the costs and complications that are part of the video surveillance experience.

[13] Available online at http://www.homeoffice.gov.uk/rds/pdfs05/hors292.pdf

IX. HOW TO MAKE AN ACCESS REQUEST

The Freedom of Information and Protection of Privacy Act (the FOIP Act) & *The Local Authority Freedom of Information and Privacy Act* (the LA FOIP Act)


Step #9
Within 30 days upon receiving the decision in #8, the applicant or a third party may appeal the decision to Court of Queen's Bench.
Step #8
The public body will decide whether or not to follow the recommendations and inform those involved.
Step #7
If necessary, upon the completion of a formal review, the Information and Privacy Commissioner will offer recommendations to the public body.
Step #6
Pursuant to the FOIP/LA FOIP Acts, the Information and Privacy Commissioner's office will review and attempt to settle the complaint informally (ie. mediation) first.
Step #5
If full access to the request is granted the process ends. If dissatisfied with other results, you may request a review by the Information and Privacy Commissioner of Saskatchewan.
Step #4
Wait for a response. Within 30 days, the public body must provide access, transfer the request, notify you of an extension of the time limit, or deny access. Additional fees may be required.
Step #3
If a formal request is necessary, access the proper form. Complete and send in the form and application fee (if applicable). Forms available from the public body or from our website: www.oipc.sk.ca.
Step #2
Call the Public Body's FOIP Coordinator to see if you can get the information without filing a formal information access request. Be as specific as you can on what you are requesting access to. The record may or may not exist.
Step #1
Determine which public body (government institution or local authority) should receive the access to information request. Records must be in the possession or control of the public body for you to make the request.

X. *THE HEALTH INFORMATION PROTECTION ACT*

Saskatchewan Health is responsible for implementation and administration of HIPA. Our office is responsible for oversight of HIPA and the activities of trustees.

HIPA came into force in Saskatchewan on September 1, 2003. At that time, we had the benefit of the experience with a similar law in the provinces of Manitoba and Alberta. That experience tells us that such a law has some complexity and that there is an important need for detailed practical information and a carefully developed training program for health sector workers in the province. High-level training is essential but clearly inadequate if it is not reinforced by more concrete case studies, check lists and specimen forms. That same experience suggests that there is a critical need for leadership from the provincial health department to assist trustee organizations do what is necessary to achieve compliance. Many trustees will not have the expertise or the resources to move to implementation without such tools from Saskatchewan Health.

Clearly, Saskatchewan Health has provided high-level training through many orientation sessions for various trustees throughout the province for a number of years prior to September 2003. Beyond that general awareness training however, I have identified some concerns with the role of the department which I will discuss later in this section.

We have observed a widespread appetite among health trustees for information on what they must do to comply with HIPA. We are frequently invited to provide presentations on HIPA and likely problem areas to health provider groups. We also have fielded many requests from trustees seeking summary advice on the Act and its provisions.

At this point, it may be appropriate to discuss a fundamental feature of HIPA.

Key to understanding HIPA is section 27(2) and the provision that allows disclosure of personal health information without consent. Reference is made to "deemed consent" but I prefer to describe this as a "no-consent" provision. This applies when disclosure is for the purpose for which the information was collected or "*for a purpose that is consistent with that purpose*". It also applies when disclosure is "*for the purpose of arranging, assessing the need for, providing, continuing, or supporting the provision of, a service requested or required by the subject individual*". If the trustee is a health professional, the disclosure must be made in accordance with the ethical practices of that profession. If the trustee is not a health professional it must have established policies and procedures to restrict disclosure on a need to know basis.

This deemed consent provision is, in my view, a departure from the patient autonomy approach and the emphasis on consent that has been developed by Canadian courts. Presumably to balance the deemed consent provision, the Legislative Assembly incorporated a number of general requirements for any trustee. This includes the need to provide information to an individual about how their personal health information will be

X. *THE HEALTH INFORMATION PROTECTION ACT* (CONT'D)

used and disclosed, transparency as to the rights of individuals to access their own information, seek to have errors corrected, and the need to protect personal health information in the custody or control of a trustee through administrative, technical and physical safeguards.

Both the deemed consent and the general duties are integral components of HIPA and make up the total package. In my view, a trustee in Saskatchewan cannot rely on deemed consent if it is in violation of its general duties prescribed by HIPA.

Our office has encountered a number of trustees that have not yet met all of the general duties. For example:

- Some trustees do not have clear policy and forms to enable access and correction of personal health information by the subject individuals.

- In some cases trustees were not treating a request from an individual to access their own personal health information any differently than a disclosure of that same information to some outside agency. In fact they are different activities. An access request is a matter of right while disclosure is discretionary.

- Some HIPA coordinators don't have obvious leadership roles in their respective trustee organization. In some cases, it appears that responsibility for HIPA compliance is vested in a committee of senior managers rather than the HIPA coordinator.

- Some trustees fail to communicate to individuals their rights and remedies under HIPA.

- A number of trustees have not yet completed the development of tools and training that are required to achieve full compliance with HIPA.

I am sympathetic to health regions, colleges and other trustees who are attempting to implement a complex new law with no new resources and with limited access to appropriate expertise. The response of Saskatchewan Health has largely been to initiate and support a large group known as the CIO Privacy Forum. This includes representatives of health regions, the Saskatchewan Cancer Agency, colleges and health profession regulatory organizations. Saskatchewan Health facilitates and hosts meetings of this group and provides legal advice. A number of subcommittees have been tasked with responsibility to develop tools for trustees.

X. *THE HEALTH INFORMATION PROTECTION ACT* (CONT'D)

I have two comments with respect to the CIO Privacy Forum:

1) I understand the value in collaboration and cooperation among trustees and the kind of information sharing that follows. I am concerned however that in the start-up of a new law like HIPA, there is a need for focused expertise for the timely development of implementation tools. In my view, at the time HIPA was proclaimed there was a need for a comprehensive manual with sample forms, practical examples and clear direction. The fact that one and one-half years after proclamation, many trustees are still dealing with an assortment of "draft" forms and incomplete policies suggests that more leadership from the department would have helped.

2) If the department didn't have the expertise or resourcing required to develop the manual, sample forms, etc., to coincide with proclamation of HIPA it should have contracted for that expertise to ensure that the efforts of trustees could be focused on comprehensive training rather than struggling to develop materials and policies on their own or even collectively through the CIO Privacy Forum.

When we make inquiries of many trustees, we are advised that they may not have this or that policy but that they are waiting for certain tools and policies to be developed by the CIO Privacy Forum. In our experience, it takes considerably longer to develop forms and procedures when they are done by committee. The responsibility for complying with HIPA however is vested in each trustee and cannot be sub-delegated to some third party.

I recommend that Saskatchewan Health proceed forthwith to produce a comprehensive manual to explain what HIPA entails in practical terms. This manual should include case studies, sample forms and appropriate advice on how to apply HIPA. Such a manual should be made available to every trustee in the province. In addition, the website of Saskatchewan Health needs to be bolstered to provide practical information about HIPA to health sector workers or individual patients or clients. I encourage the department to overhaul its website to make it more useful and relevant to anyone seeking more information on how HIPA works in practice. I also recommend that the department prepare comprehensive HIPA training materials including audio-visual material that can be accessed by trustees at little or no cost.

I would encourage the department to continue its support of the CIO Privacy Forum but to enable that to be more of a clearing-house for experiences and shared learning rather than the body responsible for designing forms and materials that should properly be the responsibility of the department.

X. *THE HEALTH INFORMATION PROTECTION ACT* (CONT'D)

Currently a number of trustees in the province are routinely relying on deemed consent when they use and disclose personal health information without consent and without even notice to the individual patient or client. At the same time, they have not installed the safeguards and protection for privacy and confidentiality mandated by HIPA. This asymmetrical implementation of HIPA is problematic. It can undermine public confidence in the public health care system. It may signal to health sector workers that privacy and confidentiality are of secondary importance instead of a foundational feature of our health care system.

As noted earlier in this Report, we have developed a PIA tool that was posted to our website, www.oipc.sk.ca. Given the feedback we subsequently received on the PIA form, we determined that it would be more useful for trustees for our office to develop a HIPA specific PIA. We intend to review this with regional health authorities before posting the new form to our website.

In many health regions, access to information under the LA FOIP Act is a responsibility assigned to one individual and compliance with HIPA is assigned to someone else in a different part of the organization. I recognize that given the historic relative inactivity under the LA FOIP Act, this divided responsibility was not identified as a problem. There has been however a marked increase in the utilization of these laws and we anticipate that this trend will continue for the foreseeable future. In our view, this increasing awareness of information rights will directly impact health regions and warrants a review of how the 'access and privacy' file is managed. The current divided responsibility is inefficient, cumbersome and ultimately contributes to an unacceptably low level of statutory compliance. It means that the obvious advantage of developing expertise and experience with access and privacy is impaired.

We strongly recommend that regional health authorities and indeed, all trustee organizations that are also either government institutions or local authorities, task the same person with responsibility for both the LA FOIP Act, the FOIP Act, and HIPA compliance.

Although we have received few formal complaints under HIPA, we have spent a good deal of time working with trustee organizations and individual trustees to meet statutory requirements. Major problem areas identified to date include the following:

- **ACCESS**

  We have encountered a number of trustees who have not responded to access requests within the statutory 30-day period. Other trustees have refused access altogether or have insisted that the applicant disclose the reasons for the access

X. THE HEALTH INFORMATION PROTECTION ACT (CONT'D)

request before complying. In most of these cases, we have been able to refer these complainants to the appropriate regulatory body or college pursuant to section 42(2)(f). That provides as follows:

> *42(2) The commissioner may refuse to conduct a review or may discontinue a review if, in the opinion of the commissioner, the application for review:*
>
> ...
>
> *(f) concerns a professional who is governed by a health professional body or prescribed professional body mentioned in clause 27(4)(h) that regulates its members pursuant to an Act, and the applicant has not used a complaints procedure available through the professional body*

Almost all of these complaints appear to have been satisfactorily resolved with the assistance of the professional body.

- **SECURITY**

A number of cases have been brought to our attention when personal health information has been improperly disclosed or gone missing. This includes the theft of desktop computers with health information on the hard drive and theft of a vehicle being used by a health worker working away from the records centre but with personal health information in files in the vehicle. These incidents underscore the importance of meeting the requirement to have appropriate safeguards for personal health information.

Interestingly, the new Ontario *Personal Health Information Protection Act* (PHIPA) is the only privacy law in Canada that requires notification to individuals when their personal health information has been lost or stolen. In the absence of such a codified duty in Saskatchewan, the advice we have given trustees is that our expectation is that in most such cases, the individuals whose information has been improperly disclosed, are entitled to notification. This should follow a risk assessment. If the risk is very low, there may be no need to notify or perhaps some indirect method of communication may suffice.

X. *THE HEALTH INFORMATION PROTECTION ACT* (CONT'D)

- **DISCLOSURE**

  We have heard from a number of trustees and from a number of police services that there is uncertainty over what personal health information can be shared with police and under what circumstances. We will be developing, in conjunction with police and health regions, a set of guidelines and frequently asked questions to assist trustees and police services. A complicating factor is that since Saskatchewan exempts police services from the FOIP and LA FOIP Acts, municipal police services other than the RCMP have not had the benefit of experience with a public sector privacy law. It will be important for police services in the province to become familiar with the provisions governing disclosure of personal health information by trustees.

- **CONSENT**

  In the following section, I address the question of "deemed consent" and what I find problematic about the no-consent elements of HIPA. I want to suggest that the deemed consent should be seen as establishing a floor and not a ceiling. Given the importance of patient confidence, I encourage trustees to consider when it is appropriate to obtain express consent or at least an opt-out provision in order to maintain a high level of public confidence in our health care system and its use and disclosures of personal health information.

XI. SASKATCHEWAN AND THE PAN-CANADIAN HEALTH INFORMATION PRIVACY AND CONFIDENTIALITY FRAMEWORK

In 1999 the federal Advisory Council on Health Infostructure produced its final report, *Paths to Better Health*. That report includes some thoughtful and far-sighted observations about the need for coordination and harmonization of health information and privacy regimes across Canada:

> *"Significant variations now exist in provincial and territorial laws, regulations and guidelines for privacy and the protection of personal health information in the public sector. In the Council's view, as noted in its interim report, a real danger exists that Canada could end up with many different approaches to privacy and the protection of personal information. Different approaches could make it difficult, if not impossible, to improve the portability of services or create information resources needed for*

XI. SASKATCHEWAN AND THE PAN-CANADIAN HEALTH INFORMATION PRIVACY AND CONFIDENTIALITY FRAMEWORK (CONT'D)

accountability and continuous feedback on factors affecting the health of Canadians. In some cases, any exchange of information might be prohibited by law in those jurisdictions that do not provide adequate protection for personal health information. Refusal to share information in such circumstances would be entirely defensible.

However, it is to be hoped that the circumstances justifying such a refusal can be avoided in Canada.

For these reasons, in its interim report the Council called on the federal Minister of Health to take the lead in encouraging an accord among provincial, territorial and federal governments to harmonize the approaches in their respective jurisdictions to privacy and the protection of personal health information taking into account best practices internationally. The Council also recommended that all government in Canada should ensure that they have legislation to address privacy protection specifically aimed at protecting personal health information through explicit and transparent mechanisms."

In early 2005, the Deputy Ministers of Health from the federal, provincial and territorial governments approved the *Pan-Canadian Health Information Privacy and Confidentiality Framework* (Pan-Canadian Framework). The only two provinces which did not approve this framework are Quebec and Saskatchewan. Saskatchewan had initially been a co-chair of the framework project.

Key to the Pan-Canadian Framework is the concept of "implied consent". This implied consent or inferred consent model recognizes that if a health care provider provides a patient with information about its privacy policies and collects, uses or discloses personal health information in the context of delivering health care services, the consent of the patient to that collection, use or disclosure can be inferred. Such an implied consent can be revoked by the individual patient. All other Canadian jurisdictions have accepted that *"The Framework is a valuable tool to inform and influence any privacy legislative process within jurisdictions affecting personal health information."*[14] It is expressly designed to achieve more consistent privacy provisions across jurisdictions and across the commercial and non-commercial sectors of health care. The new Ontario PHIPA has incorporated this notion of implied consent. Alberta and Manitoba, also with stand-alone health information laws, have agreed to move towards the implied consent model.

Significantly, Industry Canada, the department responsible for PIPEDA, has now initiated the process to certify the Ontario PHIPA as a statute "substantially similar" to PIPEDA. In the event that Ontario is successful in obtaining the substantial similarity designation and

[14] January 27, 2005, page i

XI. SASKATCHEWAN AND THE PAN-CANADIAN HEALTH INFORMATION PRIVACY AND CONFIDENTIALITY FRAMEWORK (CONT'D)

in the event that Alberta and Manitoba proceed as expected to substitute implied consent for the current no-consent feature in their statutes, Saskatchewan would be alone with a law that does not provide for implied consent. Our office also has concerns that the no-consent feature of HIPA may not survive a challenge under the *Charter of Rights and Freedoms*. By failing to reflect the patient autonomy that underlies the Charter right of privacy, Saskatchewan risks judicial intervention in the regulation of health information in the province.

In conclusion, we are concerned that Saskatchewan's insistence on eliminating any consent requirement puts this province out of step with almost all other Canadian jurisdictions. This will likely have significant implications as we move towards a Canadian electronic health record for all residents.

We recommend that Saskatchewan Health re-evaluate the deemed consent or no-consent feature in HIPA and consider substituting an inferred consent consistent with the rest of the nation.

XII. CASE SUMMARIES

Many of the complaints and requests for review to our office are resolved informally or through one or another forms of mediation. If a mediated settlement is achieved then we normally write both the applicant/complainant and the public body confirming our understanding of the resolution and advising both parties we will proceed to close our file and not issue a formal report.

A sample of cases where no settlement was achieved and it became necessary for our office to issue a report follows:

A. INVESTIGATION REPORT 2005-001 – AUTOMOBILE INJURY APPEAL COMMISSION

The complainant asked the Commissioner to investigate the practice of the Automobile Injury Appeal Commission of publishing on its website the full text of its decisions. Those decisions include a good deal of personal information and personal health information of those persons applying for compensation. The Commissioner found that there is no legislative requirement that the Commission publish decisions on its website and that such publication falls short of privacy 'best practices'. The Commissioner found that the Commission had failed to adequately protect the privacy of the applicant as it is required to

XII. CASE SUMMARIES (CONT'D)

A. INVESTIGATION REPORT 2005-001 – AUTOMOBILE INJURY APPEAL COMMISSION (CONT'D)

do by the FOIP Act and HIPA. The Commissioner made a number of recommendations to the Commission including:

- That the Commission should immediately ensure that the identity of applicants is masked before the decision that relates to them is posted on the Commission's website;
- That the Commission should within 30 days ensure that decisions already posted on its website are revised so that the identity of applicants is masked;
- That the Commission should immediately, and in any event within 30 days, task an individual with specific responsibility as Freedom of Information and Privacy Coordinator and ensure that both employees and applicants are made aware of that individual and his or her contact information;
- That the Commission should, within 90 days, develop comprehensive written policies and procedures as required by section 16 of HIPA; and
- The Commission should provide comprehensive training for its staff and Commission members of the access and privacy requirements to which the Commission is subject including the FOIP and HIPA Acts. This training should occur within 90 days and plans should be developed for regular in-service refresher training at appropriate future intervals.

On March 1, 2005 the Chair of the Commission wrote to our office to advise of its response to our report pursuant to section 56 of the FOIP Act. The Chair advised that the Commission declined to cease publication of its decisions as rendered in their original form on its website and on www.canlii.org. The Commission has not provided our office with copies of the comprehensive written policies and procedures to comply with section 16 of HIPA.

The Chair also offered observations on our analysis in our Report specifically our discussion of risks associated with the publication of personal information and personal health information. The position of the Commission appears to be that such risks are not material given the nature of personal information and personal health information that is in fact disclosed when those decisions are published to the world via the internet. The notion that the detailed information exposed on its website is unrelated to such problems as identity theft, marketing opportunities, commercial data bases, personal safety of victims of domestic violence and stalking is naïve. Identity theft, data mining and those other problems cited in our report are really about collecting information on someone incrementally and linking that data, often through the service of powerful search engines. It is surprisingly easy for a resourceful thief to assemble information about any individual. It means collecting bits and pieces of data from different sources and aggregating it by means of search engines.

XII. CASE SUMMARIES (CONT'D)

A. INVESTIGATION REPORT 2005-001 – AUTOMOBILE INJURY APPEAL COMMISSION (CONT'D)

Dr. Latanya Sweeney, through her work with the Data Privacy Lab and the Surveillance of Surveillances project at the School of Computer Science at Carnegie Melon University, Pittsburg, U.S.A.[15], has been an excellent resource to our office with useful information about the risks to privacy posed by internet publication. Dr. Sweeney and her colleagues have demonstrated the surprising amount of personal information that can be discovered and assembled using computer searches that begin with little more than someone's name. In other words, identity theft and the other harm that can result from poor privacy practices doesn't even require driver's licences, SIN numbers, credit card numbers, etc. to initiate data profiling of any given individual. We need to understand that a little information gathered from multiple data banks gives identity thieves all they need.

B. REPORT LA-2004-001 – LLOYDMINSTER PUBLIC SCHOOL DIVISION

The Applicant was denied access to certain records in the possession or control of the school division that were critical of the Applicant's suitability for volunteering in after-school sport activities. The Commissioner found that the stated reason for denial of access was not appropriate given the LA FOIP Act.

This review highlighted no awareness of the LA FOIP Act and what it requires of a school division. We discovered that a school division employee who made notes concerning matters for which the Division was responsible were treated as the 'personal information' of that individual and not subject to the LA FOIP Act and not captured by a request for access. We noted in our report that *"A personal record might consist of someone's grocery list or dry-cleaning receipt. To give 'personal record' the expansive meaning ascribed to it by the Division would undermine the principle of transparency that is fundamental to the Act."* In addition, a binder of materials that would be responsive to the request for access were returned to the author by the Division three days after the Division acknowledged receipt of the second of two access requests from the Applicant.

I found that:

> The Applicant was denied access to certain records in the possession or control of the School Division that were critical of the Applicant's suitability for volunteering in after-school sport activities. The Commissioner found that the stated reason for denial of access was not appropriate given the LA FOIP Act.

[15] http://privacy.cs.cmu.ed/dataprivacy/projects/sos

XII. CASE SUMMARIES (CONT'D)

B. REPORT LA-2004-001 – LLOYDMINSTER PUBLIC SCHOOL DIVISION (CONT'D)

I recommended that:

- The Division undertake a further search for responsive records;
- The Division review and revise its Record Retention and Disposal Schedule to clearly address what is and what is not a record of the Division and to clarify the difference between transitory and permanent records;
- Personal information of an individual that is used to make a decision by a local authority should be retained for at least one year after the date of the decision to enable the affected individual to seek access to that record;
- That the Division provide this office and the Applicant with a copy of its revised Record Retention and Disposition Schedule within 90 days;
- That the Division institute a training program for staff on the requirements of the LA FOIP Act with particular attention to what records and information are subject to the Act and what the requirements are for dealing with an access request and how mandatory and discretionary exemptions are applied; and
- That the Legislative Assembly consider an amendment to the LA FOIP Act to create an offence to destroy any records subject to this Act or to direct another person to do so, with the intent to evade a request for access to the records.

The Division's response pursuant to section 54 was that it would decline to release the document since *"it remains the view of the Board that section 30(2) can be read so as to exempt disclosure of the document. It is our understanding that the purpose of the section is to allow confidential information to be supplied to the local authority to enable them to appropriately select personnel working with the local authority. Whether employees are paid or are volunteers the same concerns and consideration arise. As a Board of Education we must ensure that the safety of our children and we must be able to assure third parties that when they supply confidential information about applicants that it will remain confidential."*

C. REPORT F-2004-005 – EXECUTIVE COUNCIL

The Applicant sought certain materials prepared by or for or held by Executive Council with respect to a public opinion survey in November 2003. Executive Council denied access on the basis that the information would be published within 90 days. The Commissioner found that Executive Council calculated the time correctly. The Commissioner further found that Executive Council failed to meet its duty to reasonably assist the Applicant and failed to respond openly, accurately and completely. The Commissioner recommended that Executive Council provide access to the raw data related to the survey and to records with respect to the costs of the survey.

XII. CASE SUMMARIES (CONT'D)

C. REPORT F-2004-005 – EXECUTIVE COUNCIL (CONT'D)

In this report we relied on the implicit duty on the part of the government institution to make every reasonable effort to assist an applicant and to respond without delay to each applicant openly, accurately and completely. This also means the institution must make an adequate search for all records responsive to the access request.

Subsequent to issuance of our report, Executive Council promptly provided the Applicant with access to both the Data Tables and confirmed the cost of the polling.

D. REPORT F-2004-006 – SASKATCHEWAN HUMAN RIGHTS COMMISSION

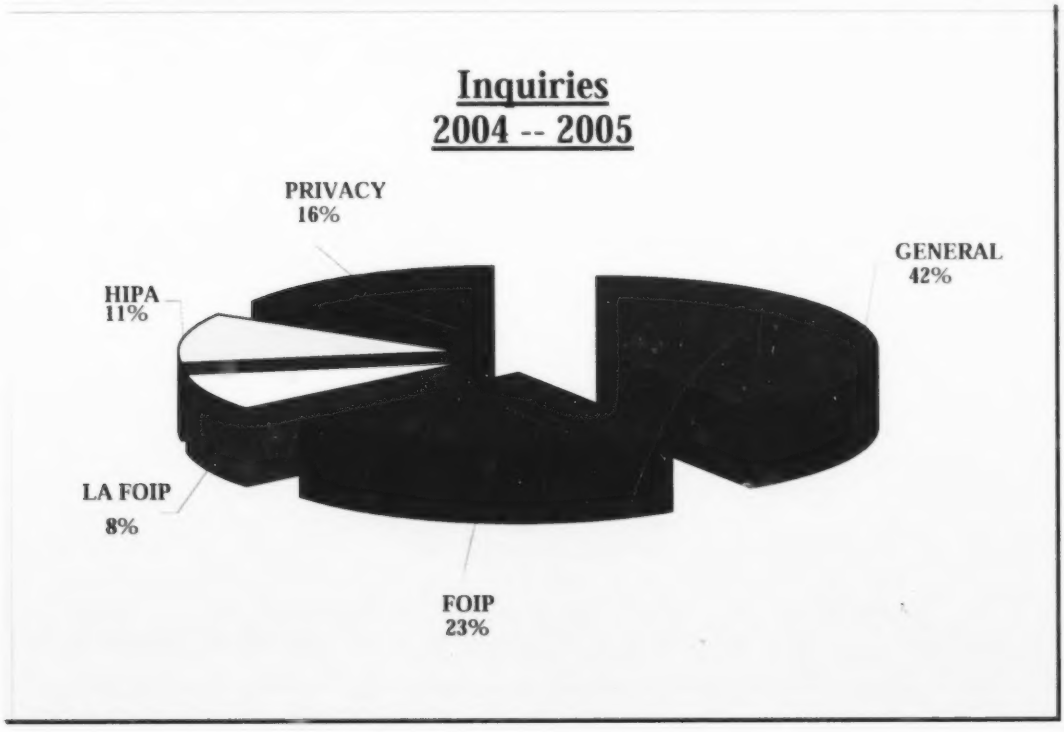
The Applicant sought access to a file in the possession of the Saskatchewan Human Rights Commission. The file in question had been provided to the Commission in 2002 for purposes of an investigation undertaken pursuant to the *Saskatchewan Human Rights Code*. This included material from an organization not subject to the FOIP Act. The Commission refused access on the basis of s. 15(1)(c) of the FOIP Act. The Commissioner found that 48 documents did not come within that exemption and should be produced to the Applicant after appropriate severing. The balance of documents were properly withheld on the basis of the exemption cited by the Commission. The documents to be withheld included personal health information under HIPA. The Commissioner found that the personal health information had been collected principally in anticipation of a quasi-judicial proceeding and should not be released.

E. REPORT F-2004-007– SASKATCHEWAN PROPERTY MANAGEMENT CORPORATION

The Applicant sought records with respect to the operation of a soundstage facility. This included the lease of premises to third parties. The Commissioner found that the exemptions claimed by SPMC, namely, sections 18(1)(d), (f) and 19(1)(c) did not apply to certain financial records with respect to the operation of the facility and recommended release of same. The Commissioner recommended that SPMC undertake a line by line review of all records responsive to the original request and to provide those records to the Applicant subject to severing where appropriate.

SPMC undertook the further search and released additional records to the Applicant as recommended by our office.

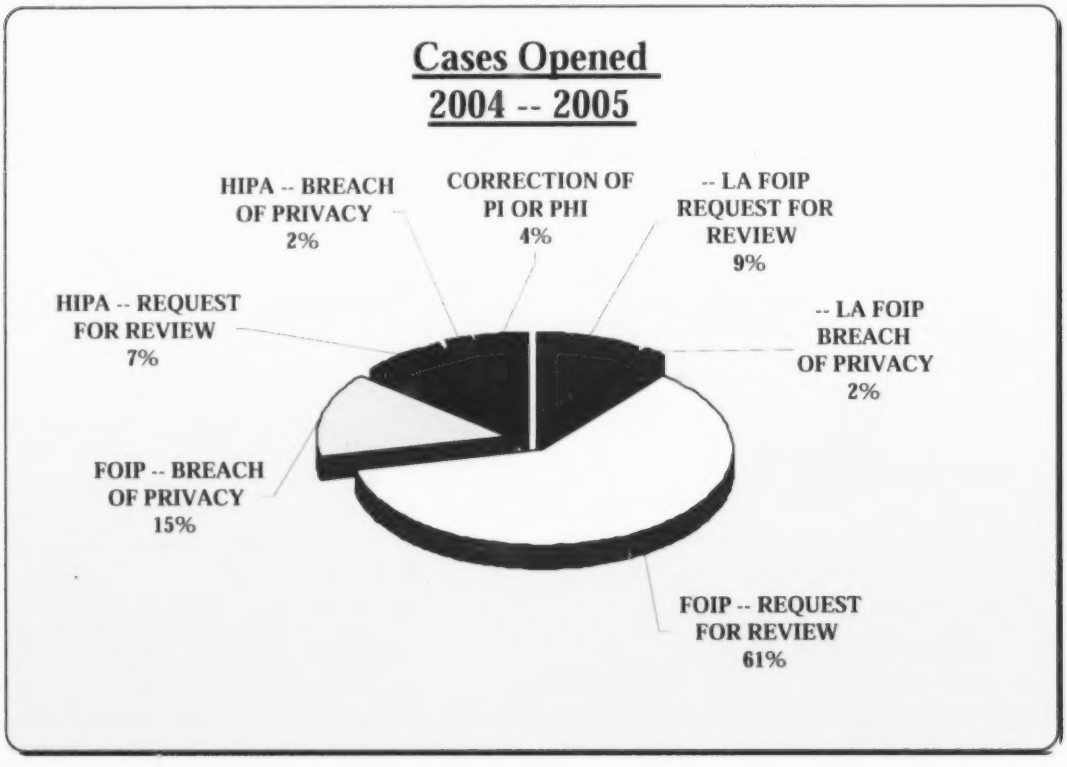
XIII. STATISTICS



There has been an 87% increase in the number of inquiries from the 2003-2004 fiscal year. An "inquiry" captures requests for information on the process or the substantive legislation.

FISCAL YEAR	NUMBER OF INQUIRIES
2002 – 2003	428
2003 – 2004	641
2004 – 2005	1,196

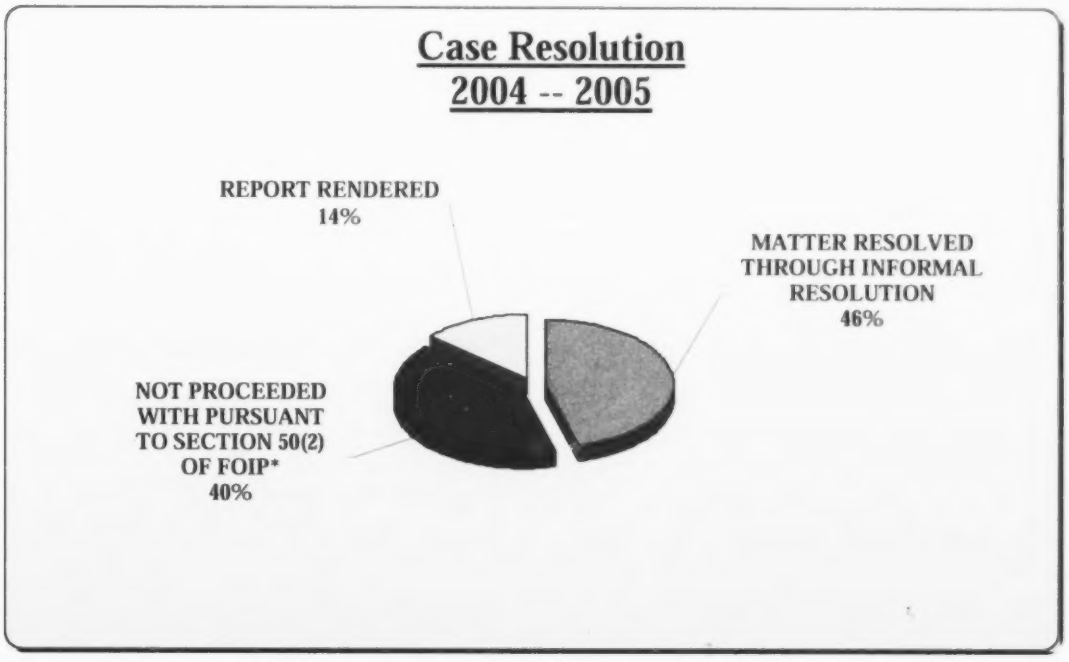
XIII. STATISTICS (CONT'D)


Cases Opened
2004 -- 2005
HIPA -- BREACH OF PRIVACY 2%
CORRECTION OF PI OR PHI 4%
-- LA FOIP REQUEST FOR REVIEW 9%
HIPA -- REQUEST FOR REVIEW 7%
-- LA FOIP BREACH OF PRIVACY 2%
FOIP -- BREACH OF PRIVACY 15%
FOIP -- REQUEST FOR REVIEW 61%

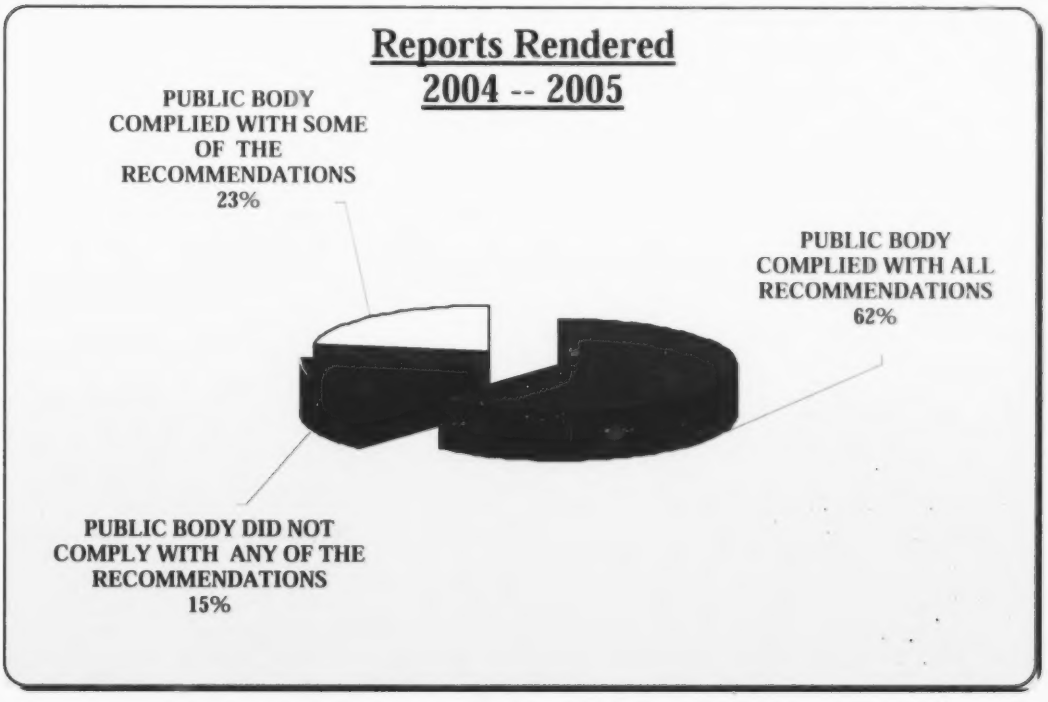
There has been a 49% increase in case files from the 2003-2004 fiscal year.

FISCAL YEAR	NUMBER OF CASES
2002 – 2003	75
2003 – 2004	92
2004 – 2005	137

XIII. STATISTICS (CONT'D)



* This relates to a single applicant who made more than 30 Requests for Review. The Commissioner found that these requests constituted an abuse of the access process.


Reports Rendered
2004 -- 2005
PUBLIC BODY COMPLIED WITH SOME OF THE RECOMMENDATIONS
23%
PUBLIC BODY COMPLIED WITH ALL RECOMMENDATIONS
62%
PUBLIC BODY DID NOT COMPLY WITH ANY OF THE RECOMMENDATIONS
15%

XIV. FINANCIAL STATEMENTS AS AT MARCH 31, 2005

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AUDITOR'S REPORT

To the Members of the Legislative Assembly of Saskatchewan

I have audited the statement of financial position of the Office of the Information and Privacy Commissioner as at March 31, 2005 and the statements of operations, change in net debt and cash flows for the year then ended. The Office is responsible for preparing these financial statements. My responsibility is to express an opinion on these financial statements based on my audit.

I conducted my audit in accordance with Canadian generally accepted auditing standards. Those standards require that I plan and perform an audit to obtain reasonable assurance whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation.

In my opinion, these financial statements present fairly, in all material respects, the financial position of the Office of the Information and Privacy Commissioner at March 31, 2005 and the results of its operations, and its cash flows for the year then ended in accordance with Canadian generally accepted accounting principles.

Fred Wendel, CMA, CA
Provincial Auditor

Regina, Saskatchewan
June 2, 2005

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
STATEMENT OF FINANCIAL POSITION
As at March 31

	2005	2004
Financial assets		
Due from the General Revenue Fund	$ 7,964	$ 35,733
Liabilities		
Accounts payable	7,801	30,014
Accrued vacation pay	163	5,719
Net debt	---	---
Non-financial assets		
Tangible capital assets (Note 3)	53,426	40,558
Prepaid expenses	4,440	5,227
	57,866	45,785
Accumulated surplus	$ 57,866	$ 45,785

(See accompanying notes to the financial statements)

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
STATEMENT OF OPERATIONS
For the Year Ended March 31

	2005		2004
	Budget (note 4)	Actual	Actual
Revenue:			
General Revenue Fund -Appropriation	$ 387,000	$ 377,467	$ 295,210
Total revenue	387,000	377,467	295,210
Expenses:			
Salaries & other employment expenses	223,000	233,720	134,724
Administrative & operating expenses	60,570	33,140	26,335
Rental of space & equipment	27,780	27,660	28,814
Travel	35,440	30,103	12,179
Advertising & promotion	25,210	21,073	7,298
Amortization	---	16,634	10,140
Contractual & legal services	8,500	2,286	29,935
Other Expenses	6,500	770	---
Total expense	$ 387,000	$ 365,386	$ 249,425
Annual surplus for the year	$ ---	12,081	45,785
Accumulated surplus - beginning of year		45,785	---
Accumulated surplus - end of year		$ 57,866	$ 45,785

(See accompanying notes to the financial statements)

Statement 3

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
STATEMENT OF CHANGE IN NET DEBT
For the year ended March 31

	2005	2004
Annual surplus	$ 12,081	$ 45,785
Acquisition of capital assets	(29,502)	(50,698)
Amortization of capital assets	16,634	10,140
	(12,868)	(40,558)
Use of a prepaid expense	787	(5,227)
	(12,081)	(45,785)
(Increase) in net debt	---	---
Net debt, beginning of year	---	---
Net debt, end of year	$ ---	$ ---

(See accompanying notes to the financial statements)

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
STATEMENT OF CASH FLOWS
For the Year Ended March 31

	2005	2004
Operating transactions		
Cash received from:		
General Revenue Fund Appropriation	$ 405,236	$ 264,187
	405,236	264,187
Cash paid for:		
Salaries	239,275	106,617
Supplies and other	136,459	106,872
	375,734	213,489
Cash provided by operating transactions	29,502	50,698
Capital transactions		
Cash used to acquire tangible capital assets	(29,502)	(50,698)
Cash applied to capital transactions	(29,502)	(50,698)
(Decrease) increase in cash and cash equivalents	---	
Cash and cash equivalents, beginning of year	---	---
Cash and cash equivalents, end of year	$ ---	$ ---

(See accompanying notes to the financial statements)

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NOTES TO THE FINANCIAL STATEMENTS
MARCH 31, 2005

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1. Authority and description of operations

The Freedom of Information and Protection of Privacy Act states that the Lieutenant Governor in Council, on the recommendation of the Assembly, shall appoint an Information and Privacy Commissioner. The Commissioner is an officer of the Legislative Assembly and is appointed by resolution. The mandate of the Office is to review Government decisions under *The Freedom of Information and Protection of Privacy Act* to ensure the protection of the public's right to access records held or controlled by the Government and to ensure that personal information is only collected and disclosed according to the manner and purposes set out in the Act.

2. Summary of accounting policies

The Office of the Information and Privacy Commissioner (Office) used Canadian generally accepted accounting principles to prepare these financial statements. The following accounting policies are considered to be significant:

a) Basis of accounting

The financial statements are prepared using the expense basis of accounting.

b) Revenue

The Office receives an appropriation from the Legislative Assembly to carry out its work. General Revenue Fund appropriations are included in revenue when amounts are spent or committed. The Office's expenditures are limited to the amount appropriated to it by the Legislative Assembly

c) Tangible capital assets

Tangible capital assets are reported at cost less accumulated amortization. Tangible capital assets are amortized on the straight-line basis over a life of three to five years.

d) Accrued vacation pay

The value of vacation entitlements earned to the year-end but not taken are recorded as a liability.

3. Tangible capital assets

	2005			2004		
Type	Cost	Accumulated Amortization	Net Book Value	Cost	Accumulated Amortization	Net Book Value
Computer Hardware & Software	$ 39,496	$ 12,750	$ 26,746	$ 21,285	$ 4,257	$ 17,028
Furniture	40,703	14,023	26,680	29,413	5,883	23,530
Total	**$ 80,199**	**$ 26,773**	**$ 53,426**	**$ 50,698**	**$ 10,140**	**$ 40,558**

4. Budget

These amounts represent funds appropriated by the Board of Internal Economy to enable the Office to carry out his duties under *The Freedom of Information and Protection of Privacy Act.*

5. Costs borne by other agencies

The Office has not been charged with certain administrative costs. These costs are borne by the Legislative Assembly. No provision for these costs is reflected in these financial statements.

6. Lapsing of appropriation

The Office follows *The Financial Administration Act, 1993* with regards to its spending. If the Office spends less than its appropriation by March 31, it must return the difference to the General Revenue Fund.

7. Financial Instruments

The Office's financial instruments include due from the General Revenue Fund and accounts payable. The carrying amount of these instruments approximates fair value due to their immediate or short-term maturity. These instruments have no significant interest rate and credit risk.

8. Transfer to General Revenue Fund

The Financial Administration Act, 1993 requires that any unspent appropriations be returned to the Minister of Finance.

XV. APPENDIX A -- DEFINITIONS

The following is a list of definitions of terms or abbreviations used in the course of this document or referenced in documents accessible from the website: www.oipc.sk.ca.

Additional definitions are found in the three provincial statutes: *The Freedom of Information and Protection of Privacy (FOIP) Act, The Local Authority Freedom of Information and Protection of Privacy (LA FOIP) Act* and *The Health Information Protection Act (HIPA).*

Applicant refers to an individual who has made an access request to a government institution, local authority, or health information trustee.

Commissioner refers to the Saskatchewan Information and Privacy Commissioner.

The **Complainant** is an aggrieved individual who makes a formal request to the Office of the Information and Privacy Commissioner to investigate an alleged "unreasonable invasion of privacy" of that public body pursuant to sections 33 of The FOIP Act, 32 of The LA FOIP Act, or 52 of The HIPA.

Complaint is an expressed concern that there has been a breach of privacy by a public body.

Control is a term used to indicate that the records in question are not in the physical possession of the public body, yet still within the influence of that body via another mechanism (i.e. contracted service).

Custody is the physical possession of a record by a public body.

Disclosure is sharing of personal information with a separate entity, not a division or branch of the public body in possession or control of that record/information.

Exemptions are sections of the relevant statutes referenced to justify the denial of access to records by the individual either for mandatory or discretionary reasons.

The **FOIP Coordinator** is an individual designated for managing access and privacy issues in any public body with this title.

FOIP Regime means the statute, regulations, practices and procedures followed in the operation of the statutes.

Government institutions refer to those prescribed in the FOIP Act and Regulations and include more than 70 provincial government departments, agencies, and Crown Corporations.

XV. APPENDIX A – DEFINITIONS (CONT'D)

The **head** of a public body is accountable by law for making the final decision on access requests, but may delegate these powers to someone else in the organization. This is typically the Minister of a department and the CEO of a local authority or Crown Corporation.

Local Authorities means local government including library boards, municipalities, regional colleges, schools, universities, and Regional Health Authorities as prescribed by the LA FOIP Act and Regulations.

Mediation is the process of facilitating discussion between the parties involved in an informal investigation by the OIPC with the goal of negotiating a mutually acceptable resolution to the dispute without the issuance of a formal report.

OIPC is an abbreviation for the Office of the Information and Privacy Commissioner of Saskatchewan.

Personal information is "recorded information about an identifiable individual" and includes details such as your name, address, phone number, SIN, race, driver's license number, health card number, credit ratings, and opinions of another person about you.

Personal health information includes information about your physical or mental health and/or information gathered in the course of providing health services for you.

PIA is an abbreviation for a Privacy Impact Assessment. A PIA is a diagnostic tool designed to help organizations assess their compliance with the privacy requirements of Saskatchewan legislation.

Public Bodies are those in the public sector including government institutions and local authorities.

A **record** is information in any form or format and includes such items as documents, maps, books, post-it notes, handwritten notes, phone messages, photographs, and tape recordings.

A **report** is a document prepared by the Saskatchewan Information and Privacy Commissioner that issues recommendations to a public body for changes and/or actions in response to the findings of a formal review.

Third Party is a person other than the applicant or the public body.

Trustees as defined within section 2(t) of HIPA are individuals and corporations who are part of Saskatchewan's health system in custody or control of personal health information.

Use indicates the internal utilization of personal information by a public body.

XVI. APPENDIX B – SAMPLE LIST OF PRESENTATIONS

SAMPLE OF PRESENTATIONS MADE FROM APRIL 1ST, 2004 TO MARCH 31ST, 2005

- Association of Records Managers and Administrators
- Canadian Bar Association, Business Law (South)
- Canadian Bar Association, Public Sector
- Canadian Pension and Benefits Institute
- Carlton Trail Regional College
- Carlyle Child Action Plan and Chamber of Commerce
- City of Regina
- City of Saskatoon
- Commissioners of Public Service Commission
- Court of Queen's Bench
- Cumberland Regional College
- Cypress Hills Regional College
- Davidson School Division
- Estevan Child Action Committee
- Heartland Health Region
- International Association of Business Communicators (IABC)
- International Personnel Management Association (IPMA)
- Journalists Institute
- KidsFirst
- Lanigan High School
- Legal Education Society
- Legislative Interns
- Ophthalmic Dispensers Association Conference
- PULSE Growers
- Regina Qu'Appelle Health Region
- Regional Colleges Provincial Committee
- Regional Intersectoral Committee
- Rotary Club, North Battleford
- Rural Municipality Administrator's Association
- Saskatchewan Abilities Council
- Saskatchewan Assessment Management Agency (SAMA)
- Saskatchewan Association for Community Living
- Saskatchewan Association of Health Organizations (SAHO)
- Saskatchewan Association of Library Technicians (SALT)
- Saskatchewan Deputy Ministers
- Saskatchewan Genealogical Society
- Saskatchewan Government Insurance
- Saskatchewan Government Relations and Aboriginal Affairs

XVI. APPENDIX B – SAMPLE LIST OF PRESENTATIONS (CONT'D)

SAMPLE OF PRESENTATIONS MADE FROM APRIL 1ST, 2004 TO MARCH 31ST, 2005 (cont'd)

- Saskatchewan Justice, Executive Committee
- Saskatchewan Learning
- Saskatchewan Ombudsman
- Saskatchewan Outfitters Association
- Saskatchewan Parks and Recreation Association
- Saskatoon Housing Authority
- Saskatoon Public School Division
- Official Opposition Constituency Assistants
- Souris Moose Mountain School Division
- Sun Country Regional Health Authority
- Unitarian Fellowship
- Weyburn Community Child Action Committee

XVII. APPENDIX C – LIST OF BODIES SUBJECT TO OIPC OVERSIGHT

GOVERNMENT INSTITUTIONS (70+)

LOCAL AUTHORITIES (includes the following:)

- SIAST (4 campuses)
- Universities (2)
- Libraries (589)
- Regional Colleges (9)
- Regional Health Authorities (13)
- School Divisions (82)
- Municipalities:
  - 13 cities and 478 other **urban municipalities** including:
    - 145 towns
    - 290 villages
    - 43 resort villages
  - Southern Saskatchewan has 296 **rural municipalities**
    - The rural municipalities include 166 organized hamlets.
  - In the Northern Saskatchewan Administration District there are:
    - 2 towns
    - 13 northern villages
    - 9 northern hamlets
    - 11 northern settlements

XVII. APPENDIX C – LIST OF BODIES SUBJECT TO OIPC OVERSIGHT (CONT'D)

SASKATCHEWAN HEALTH TRUSTEES INCLUDE
(Others which may be added through regulations):

- Government Institutions
  - 17 Departments
  - 76 Crown Corporations and Agencies
- Regional Health Authorities and Affiliates
  - 13 health authorities
- Special Care Homes
- Personal Care Homes
- Mental Health Facilities
- Laboratories
- Pharmacies
- Community Clinics
- Saskatchewan Cancer Agency
- Ambulance Operators
- Regulated Health Professions
  - 1500 physicians and surgeons
  - 9000 registered nurses
- Health Profession Regulatory Bodies
  - Chiropractors Association of Saskatchewan
  - College of Dental Surgeons of Saskatchewan
  - College of Physicians and Surgeons of Saskatchewan
  - Dental Technicians Association of Saskatchewan
  - Denturist Society of Saskatchewan
  - Registered Psychiatric Nurses Association of Saskatchewan
  - Saskatchewan Association of Chiropodists
  - Saskatchewan Association of Licensed Practical Nurses
  - Saskatchewan Association of Medical Radiation Technologists
  - Saskatchewan Association of Optometrists
  - Saskatchewan Association of Speech/Language Pathologists and Audiologists
  - Saskatchewan College of Physical Therapists
  - Saskatchewan College of Psychologists
  - Saskatchewan Dental Assistants Association
  - Saskatchewan Dental Hygienists Association
  - Saskatchewan Dental Therapists Association
  - Saskatchewan Dieticians Association
  - Saskatchewan Ophthalmic Dispensers Association
  - Saskatchewan College of Pharmacists
  - Saskatchewan Registered Nurses' Association
  - Saskatchewan Society for Medical Laboratory Technologists
  - Saskatchewan Society of Occupational Therapists
  - Saskatchewan Association of Social Workers